United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RHOZIER T. BROWN, JR., APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,891

JOHN D. IRBY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,892

ROBERT L. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Cr. No. 1070-64

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
THEODORE WIESEMAN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Whether the trial court properly received into evidence the testimony of an accomplice—

   a. because appellants Irby and Jones lacked standing to challenge the evidence; and

   b. because the testimony was not the fruit of a statement that appellant Brown gave during an illegal detention?

2. Whether the accomplice's testimony was inadmissible because he had moved after the capital list of witnesses, containing his old address, had been served on appellants?

3. Whether the evidence was sufficient to support the jury verdicts?

4. Whether the trial court abused its discretion in denying separate trials to appellants Irby and Jones—

   a. because they wanted to call each other and appellant Brown as witnesses; or

   b. because appellant Brown raised the dual defenses of not guilty and insanity?

5. Whether in explaining the information on which they based their expert opinions, psychiatrists could refer to observations of a patient's behavior made by nurses?

6. Whether before the accomplice testified the court fully advised him of his rights and offered to appoint counsel to advise him?

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,890

RHOZIER T. BROWN, JR., APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,891

JOHN D. IRBY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,892

ROBERT L. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE [1]

After a trial lasting ten days, appellants were convicted of felony murder and housebreaking (22 D.C. Code §§ 1801, 2401). Although the prosecutor announced in closing argument that the government was not asking for the death penalty (Tr. 1136), the jury reported that it was unable to agree on punishment. Accordingly, the trial court, the Honorable Oliver Gasch, exercised his discretion pursuant to 22 D.C. Code § 2404 (Supp. V, 1966) and sentenced each appellant to life imprisonment.

Evidence of Guilt [2]

The deceased, Lonnie Page, known as "Shag," was in the business of buying and selling stolen property—in other words, he was a "fence" (Tr. 194, 199, 528). He lived in a house with his girlfriend, her eight year old daughter, and another girl described as a babysitter (Tr. 214). On the morning of October 2, 1964, the police found him lying dead on his kitchen floor with three bullets in his body, two from a .32 caliber and one from a .25 caliber weapon. Two other live bullets were near his body. (Tr. 288-290, 511-513, 575.) They also found in his pocket $799 in cash (Tr. 541). His house had been ransacked, and television sets and other articles were

---

[1] "Tr." refers to the transcript; "G.Ex." to government exhibits; and "Brown Ex.", "Irby Ex.", and "Jones Ex." to appellants' exhibits. The numbers on appellants' exhibits are confusing because in the middle of the trial the marking system was changed. We have used the numbers appearing on the clerk's list of exhibits and have described the exhibit wherever possible.

Two exhibits, government's numbers 5 and 6, were identified but not received into evidence. We have filed a motion to lodge these exhibits with the Clerk and have referred to them in this brief in footnotes 7, 9, and 19, *infra*, and only for the limited purposes set forth in those footnotes.

[2] Since more than one defendant was on trial, evidence introduced by appellants cannot be used in supporting the sufficiency of the evidence. *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963). Therefore, our statement of the evidence contains only the testimony of government witnesses.

stacked near the front door (Tr. 191, 199, 511). No one had been home except the little girl; her arms and legs had been bound and her head covered with a pillow case (Tr. 190-191, 193, 215, 231, 242, 298-299). At trial, the government's case rested on the testimony of an accomplice.

The accomplice, Willie B. Whitmire, testified that on the afternoon before the murder he was driving around in a car loaned to him by a friend when he saw appellant Irby, who was his first cousin, and the other two appellants standing in front of an establishment on North Capital Street (Tr. 420, 422, 423, 475-476). After stopping the car and talking with Irby, Whitmire asked, "If you do anything tonight, can I be part of it?" (Tr. 422, 477). Irby replied, "You don't have the heart to do the things that we do" (Tr. 422-423). Whitmire, whose family had been "set out" and was homeless, protested, "Man, . . . it makes a heart, man, when your family is out . . . . I need some money, some quick money to get a roof over my family's head" (Tr. 423). Irby asked appellant Brown's permission to include Whitmire. Brown left the decision to Irby, who agreed to take Whitmire along. (Tr. 423, 477.)

Irby left with Whitmire, and they drove for a time, later meeting Brown and Jones who were driving a green 1953 Chrysler. Finally, the next morning about 3:30 or 4:00 a.m., the three appellants and Whitmire met by arrangement at Irby's house. (Tr. 479-481.) Irby carried out three pistols and a rifle and all four left in Whitmire's car, stopping by Jones's house to load a television set into the trunk of the car (Tr. 424, 482, 505).

The four drove to Seventeenth Street, Southeast, arriving about 4:30 or 5:00 a.m. Whitmire was instructed to park in an alley behind a house, and a few minutes later, he was told to drive away. Sometime later, they returned and parked in the same alley. This time, the deceased and a woman walked out the back door of a house and Whitmire was again told to drive on. (Tr. 424.) They returned, parked the car, and broke into the house

through the back door (Tr. 424-425). At the time, Whitmire testified, he was not carrying a gun but the three appellants were (Tr. 426-427). Nor did he wear a mask, although Brown wore one and he could not remember about Irby and Jones (Tr. 439-440).

In the house Whitmire stood by the back door as a lookout while the three appellants went through the rooms gathering appliances, like television sets and radios, and setting them near the door (Tr. 425). After about one-half hour, Whitmire warned that the deceased, whom he described as a "very huge man," was approaching the back door (Tr. 425, 443). Brown sent Whitmire to the bedroom to keep the little girl quiet. There Whitmire found her—tied up and a pillow case over her head. She never saw him because of the pillow case and he was not in the room when she was bound. (Tr. 430, 439-442). Whitmire put his hand over her mouth. The deceased walked through the back door. Brown stepped forward and said, "All right, hold it." The deceased threw a container of milk and shots sounded. (Tr. 426, 438.) Whitmore turned the little girl loose and ran—jumping through the line of fire and running out the front door around the house to the alley where the car was parked. The three appellants left after Whitmire. Brown and Jones followed the same route as Whitmire, and Irby ran a different way. (Tr. 426-427).

They went to Irby's house and talked about it. The three appellants laughed about how scared Whitmire was and how he had run when the shooting began (Tr. 427). Later, the three appellants came to Whitmire to collect the television set in his car trunk. They showed him a newspaper story about the murder and began to joke about his fright (Tr. 429). When Whitmire testified at trial he described and sketched the inside of the deceased's house, although he had never been inside the house since the day of the murder (Tr. 431, 492-497).

The little eight-year old girl, Joyce Ann Windley, testified that three men with handkerchiefs over their faces broke into the house, tied her up with venetian blind

cords, put a pillowcase over her head, and asked where "Shag" kept his money. And when "Shag" came home, one man was hiding in the living room, one man in the bathroom, and one man in the bedroom. They shot him three times. (Tr. 231-233, 263-264). One of the men had been at the house two days earlier to sell the deceased a radio (Tr. 243, 273-275). When cross-examined about inconsistencies, she could remember none of the details of a statement she had given the police on the day of the murder (*e.g.*, Tr. 266).[3]

Other witnesses established facts that corroborated Whitmire's account. The deceased was a large man (Tr. 288). About 6:30 a.m. the deceased, in fact, left the house with his girlfriend, had driven her to work, and should have returned to the house about 7:30 a.m. (Tr. 190, 203). As they left the house, the girlfriend noticed a car without any lights drive away in front of them (Tr. 192, 209-210). About 7:15 a.m. a neighbor heard a noise and saw three men run across her front lawn and around the back of her house.[4] One of the men wore a mask. (Tr. 294-295.) Concerning the condition of the house, entry had been made by breaking a window in the back door, the house was ransacked, clothes and appliances were stacked near the door, a broken bottle of milk was on the floor, and the floor was "all messed over with milk, where they was throwing milk or something in the apartment" (Tr. 191, 511, 526). The homicide squad de-

---

[3] The little girl's testimony contained many inconsistencies—explained, perhaps, by her tender years, the shock of what she had experienced, and her fright at appearing in a courtroom. It was recognized at trial that her evidence could not be relied on strongly (*e.g.*, Tr. 385, 1020-1021). Consequently, we do not rely on other portions of her testimony, and in particular, we do not rely on her identification of appellant Irby as one of the murderers (Tr. 233-234, 279-280).

[4] The deceased lived at 405 and the neighbor at 401 Seventeenth Street and the houses were connected (Tr. 189, 293, 493). In other words, the alley behind the deceased's house was also behind the neighbor's house, and when Whitmire spoke of running around the house, he actually ran around the neighbor's house on the corner.

tective in charge of the investigation drew a sketch of the house, which the jury could compare with Whitmire's sketch (Tr. 552-553).[5] During cross examination by defense counsel, the detective testified that to the best of his knowledge Whitmire had never seen photographs of the inside of the house or the little girl's statement describing the house; nor had Whitmire ever been informed about the disarray at the murder scene, about the items found on the floor, about the broken window in the back door, or about the broken bottle of milk (Tr. 522-523, 526).

Finally, two other witnesses connected appellants Brown and Jones to the deceased and corroborated Whitmire's testimony that they drove a green 1953 Chrysler. These witnesses testified that they took Brown and Jones to the deceased's house two days before the crime to sell two radios. Brown and Jones drove their own car, which the one witness described as green and the other as old. The first witness saw two pistols in the back seat of the car (Tr. 312-316, 318, 322, 370-372).

Two police fingerprint technicians dusted the house for fingerprints. They did find some clear prints, mostly around the back door, on venetian blinds, and on some cardboard boxes; however, none of the fingerprints matched the three appellants or Whitmire. Nor did any match the prints of two other men originally arrested for the crime. Moreover, the technicians unable to find any clear fingerprints of the people who lived in the house—

---

[5] From defense counsel's closing argument it would appear that the two sketches were identical except that Whitmire's sketch had the back door leading into a hallway beside the kitchen and the detective's sketch placed the back door leading directly into the kitchen (Tr. 1101-1102). The trial judge interrupted defense counsel's argument to comment that she, not Whitmire, drew in the back door, which defense counsel promptly called to the jury's attention (Tr. 1102-1103). The record shows that defense counsel misunderstood Whitmire; for he explicitly testified that the back door "sits almost in the center of the kitchen" (Tr. 494-495). Also in evidence for the jury's consideration was a photograph of the back door and kitchen offered by counsel for appellant Brown (Tr. 524, 526; Brown Ex. 2).

the deceased, his girlfriend, and her daughter (Tr. 514-517-524, 556, 557, 578-579, 581-584).

Motion to Suppress Whitmire's Testimony

During the investigation of the case, appellant Brown, appellant Irby, and Whitmire gave written statements to the police. On the first day of trial, while at the bench discussing his proposed opening statement to the jury, government counsel said that he did not intend to mention appellant Irby's statement but that he did propose to refer to appellant Brown's statement (Tr. 24-25). Answering an inquiry by the court, the prosecutor represented that Brown was not under arrest when he gave the statement. In this statement Brown denied his guilt but claimed to know that the other two appellants, Whitmire, and "Mo" were the murderers, a claim that Brown supported with his knowledge of information about the homicide never disclosed to the public. Brown offered to work, and did work, for the police for several days to set a trap to catch the guilty persons (Tr. 25-26). Brown's attorney controverted the government's representations by representing that his client had been under arrest and interrogated for thirteen hours (Tr. 26). Finally, at the suggestion of Brown's attorney that a mistrial would result if the court were later to rule the statements inadmissible, government counsel agreed not to mention Brown's statement in his opening (Tr. 27).

The matter was raised again three days later when the government called Whitmire to testify and defense counsel moved to suppress Whitmire's testimony as the fruit of an illegal detention of Brown (Tr. 325). The court conducted a hearing out of the presence of the jury at which appellant Brown and Whitmire testified. The entire record, including the testimony at the hearing and trial, showed the following sequence of events:

> *October 2*—Murder committed. Later in day police charge two men, Williams and Richardson with the crime. Williams' arrest based on mistaken identifica-

tion by the little girl and Richardson's on erroneous identification of an article in his possession. (Tr. 535-537).

October 3—Williams and Richardson presented before magistrate, who conducts a preliminary hearing and finds probable cause to hold them for the action of the grand jury (Tr. 535-537).

October 9—Appellant Jones appears in Court of General Sessions and is sentenced to serve 180 days' imprisonment on an unrelated charge. About 10 a.m., detectives speak to appellant Brown as he is leaving meeting with his probation officer.[6] Brown goes across street to police headquarters. Detectives show him the statement of the little girl in which she said that one of the murderers resembled a man who had been at the house to sell the deceased a radio. Brown denies own guilt but says that he knows the murderers are Irby, Jones, "Bee", and "Mo". Brown promises to arrange trap to have the four murderers together with the murder weapon so that the police can arrest them. Brown leaves about 11 p.m., and on his way home, he takes a detective to Whitmire's house, which he identifies as the place where "Bee" lives. (Tr. 325-330, 335, 343-345, 461).[7]

---

[6] The above account of the circumstances surrounding Brown's statement is based solely on Brown's own testimony at the hearing; however, we have interpreted that testimony in the light most favorable to the government.

[7] We cannot support with a record reference that appellant Jones was in jail on unrelated charges during the investigation. Since counsel at trial knew this fact, no one inquired about the efforts of the police to locate Jones. We thought that the Court might wonder why Jones's apprehension was not explored, and therefore we have mentioned the fact in our counterstatement and we would ask the Court to take judicial notice of the records of the Court of General Sessions showing Jones's commitment.

Brown testified at trial that he named Irby, Jones, "Willie B. or Eli B.", and "Lowe" but this was not quite accurate. In his written statement to the police (G. Ex. 5), he named Irby, Jones, "Bee", and "Mo." Government exhibit 5, however, although identified as an exhibit and used by counsel to examine Brown, was never received into evidence.

October 10-October 18—Brown telephones police and says that he cannot arrange for Irby, Jones and Whitmire to meet. Brown tells Whitmire that he has confessed and has given everyone's name, and address. Brown suggests that Whitmire leave town. Whitmore tells his wife that he was one of the murderers and they leave the city, going first to New York and later to Massachusetts. (Tr. 345, 418, 459, 472-474.)

October 19—Appellant Brown arrested, charged with homicide, and presented before commissioner. (proceedings before commissioner).

October 20—Appellant Irby arrested and gives written statement naming Brown, Jones and Whitmire as accomplices. Either this day or the previous day, Whitmire's aunt telephones to Massachusetts and says that the police are looking for him, a bulletin was out, and that he should "come home as it didn't do any good to run." Whitmire calls his girlfriend in Washington, who is having "difficulties" and asks him to come home. Whitmire asks her to send money. (Tr. 410, 413-414, 445, 461-462; Jones Ex. 1 (Whitmire's arrest warrant)).[8]

October 21—Irby presented to commissioner. Commissioner's warrant issues for Whitmire's arrest. Affidavit supporting application for warrant states that Irby confessed and named Whitmire as accomplice. Affidavit gives Whitmire's address as the place Brown showed police on October 9. That night Whitmire and his wife arrive in Washington from Massachusetts. (Tr. 405, 413-414; Jones Ex. 1; proceedings before commissioner.)

October 22—In afternoon Whitmire arrested.[9] Taken

---

[8] The telephone conversations with the aunt and girlfriend occurred no later than October 20, because Whitmire waited to receive money from the girlfriend and arrived in Washington on the night of October 21 (Tr. 405, 445).

[9] Whitmire testified that he was arrested at 1412 Chapin Street (Tr. 339). Defense counsel assumed that address was his home and asked questions which caused the record to indicate that Whit-

to police headquarters where at first denies guilt and then confesses. While written statement being typed, police telephoned Assistant U.S. Attorney who authorizes them to release Whitmire. About 5 p.m. Whtimire signs statement and goes home (Tr. 405, 406, 534-535.)

October 23—Appellant Jones brought up from D.C. Jail, presented to commissioner, and charged with homicide. Arrest warrant for Whitmire returned unexecuted and quashed. (Jones Ex. 1; proceedings bfore commissioner).

In addition to the matters incorporated in the above sequence of events, Brown also testified that the police coerced his statement by beating him and threatening him (*e.g.*, Tr. 328-329, 339-341). The government did not offer any evidence to controvert the allegations of police brutality.[10]

Whitmire testified at length during the hearing and during cross-examination at the trial. Before he testified, the court advised him of his rights under the Fifth Amendment and offered to appoint counsel to consult with him, but Whitmire declined the offer (Tr. 377-378). He gave the police his written statement because "I wanted to clear my conscience" (Tr. 398). Before making the

---

mire was at home when arrested (Tr. 402-403, 406, 530). In fact, Whitmire's statement to the police (G. Ex. 6) showed that his girl friend lived at 1412 Chapin Street. Government exhibit 6, like government exhibit 5 (see note 7, *supra*), was identified and used to examine Whitmire but was not offered into evidence.

[10] In not offering evidence to controvert Brown's allegations of police misconduct, the government did not wish to be understood as implicitly admitting the truth of the allegations. Since the position taken by the court and the government was that Whitmire's testimony was admissible even if the police had violated the Mallory rule, evidence rebutting Brown's allegations would not have been pertinent and would have been an unwarranted imposition on the valuable time of a district judge. In any event, the government clearly stated its view on the first day of trial (see p. 7, *supra*) that Brown, who was never arrested, represented to the police that he had valuable information, and pretended to work for them as an informant.

statement, the police had advised him of his rights, including his right to counsel (Tr. 405-406). He testified under lengthy cross-examination that no promises had ever been made to him and that he was testifying voluntarily (*e.g.*, Tr. 409-410, 437). When asked if he expected to be tried for the murder, he answered, "Well,—I don't know. If so, I agree with it; if not, I still agree with it" (Tr. 457). Excerpts from Whitmire's testimony concerning the voluntariness of his written statement and his appearance at the trial have been set forth in an Appendix (pp. 39-44, *infra*).

During the hearing, the trial court *sua sponte* raised the case of *Smith (and Bowden)* v. *United States* [11] and asked Brown's attorney to distinguish it (Tr. 353). After Brown's attorney had argued at length, the court addressed counsel for appellants Irby and Jones who had not yet indicated their clients' views on the admissibility of Whitmire's testimony (Tr. 325, 353-358). The attorneys did not wish to be heard but joined Brown's motion (Tr. 358). Government counsel then contended that *Smith (and Bowden)* controlled the case and rendered Whitmire's testimony admissible (Tr. 358-359). As for the legality or illegality of Brown's statement, government counsel said that, "The Government is not offering it [the statement], and we take the position that it is not before the Court at this time" (Tr. 358).[12] Later, the Court heard argument from Jones's attorneys that Whitmire's testimony would be the fruit of police illegality in obtaining Irby's statement and that the later case of *Mc-*

---

[11] 117 U.S. App. D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964). See discussion of this case at pp. 20-21, *infra*.

[12] The government never conceded before or during the hearing that Brown's statement was obtained illegally. However, it is true that the next day, near the close of the government's case, government counsel was at the bench discussing his exhibits and did interject the comment that neither Brown's nor Irby's statement had been offered into evidence because both appellants were under detention long enough to infringe *Mallory* (Tr. 560-561).

Lindon v. *United States* [13] blunted the force of *Smith (and Bowden)* (Tr. 380-388, 414-417). Counsel for Brown joined this argument (Tr. 381-382), but counsel for Irby did not. At the conclusion of the hearing, the court ruled that Whitmire could testify (Tr. 419).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or conected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

---

[13] 117 U.S. App. D.C. 283, 329 F.2d 238 (1964). See discussion of case at pp. 21-22, *infra*.

Rule 8(b) of the Federal Rules of Criminal Procedure provided at the time of trial:

> *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provided at the time of trial:

> *Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Title 18, United States Code, Section 3432, provides:

> *Indictment and list of jurors and witnesses for prisoner in capital cases.* A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

SUMMARY OF ARGUMENT

I

There is no merit to appellants' contentions that the testimony of the accomplice Whitmire should have been excluded as the "fruit of the poisonous tree." Appellants Irby and Jones cannot challenge the testimony because the police learned Whitmire's name from appellant Brown, and they have no standing to assert any violations of appel-

lant Brown's rights. As for appellant Brown, the cases hold both on the law and the facts that the voluntary and independent decision of a witness to testify, thirteen months after the police learned the witness' name during an alleged unlawful detention, is "so attenuated as to dissipate the taint" of misconduct. *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963); *Smith (and Bowden)* v. *United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964).

II

The accomplice Whitmire's testimony was not rendered inadmissible because the capital list of witnesses contained a different address from the one at which he was living at the time of trial. The address on the list of witnesses was correct when it was served five months before trial, but later he moved to a different address. The mistake was an oversight rather than deliberate. Appellants waived their rights by not objecting at the beginning of trial. Moreover, appellants suffered no prejudice since appellant Brown never sought to locate Whitmire and since appellants Irby and Jones knew of the oversight about one week before trial but never asked the court or government to provide the new address.

III

The testimony of an eyewitness, the accomplice Whitmire, provided overwhelming proof of guilt. Corroboration of the testimony of an accomplice is not required, although in the instant case there was ample corroboration.

IV

The trial court did not abuse its discretion in denying appellants Irby's and Jones's motions for separate trials under F. R. Crim. P. 14, for they never showed actual prejudice as required by that rule. That the two appellants wished to call each other and appellant Brown as witnesses was not in itself an adequate reason for sever-

ance. Nor were they entitled to severances merely because appellant Brown relied on the dual defenses of not guilty and insanity, a claim that appellants did not present to the trial court until after all parties had rested their cases.

V

It is settled in this jurisdiction that psychiatrists have a duty to explain the facts underlying their expert opinions, and that, in explaining those facts, they can relate nurses's observations of a patient's behavior.

VI

Before the accomplice Whitmire testified, the court fully advised him of his rights and offered to appoint counsel to advise him, but Whitmire declined the offer.

ARGUMENT

I. The testimony of the accomplice Whitmire was not the fruit of police misconduct. (Raised by all appellants).

(Tr. 24-26, 325-360, 373-419, 437, 445, 454-455, 457, 459, 461-462, 467-469, 472-474, 498, 502-503, 530, 534-537, 560-561)

A. *Appellants Irby and Jones lack standing to challenge Whitmire's testimony.*

An accused cannot challenge statements or other fruits obtained during an unlawful detention of someone else, for no rights belonging to the accused have been violated.[14] It is clear that appellant Brown has standing to challenge Whitmire's testimony since he furnished Whitmire's nickname and address to the police on October 9. It is equally clear that appellant Jones lacks stand-

---

[14] *Wong Sun* v. *United States*, 371 U.S. 471, 491-492 (1963) (holding that an accused had no standing to challenge the admissibility against him of evidence that was the fruit of an unlawful arrest of his co-defendant with whom he was tried jointly); *Long* v. *United States*, No. 19,073, D.C. Cir., April 15, 1966, slip opinion p. 5.

ing; for throughout the investigation he maintained a considered silence, never made any statements, and none of his rights were ever violated. As for appellant Irby, he too lacks standing.

Appellant Irby never attacked Whitmire's testimony at trial as being the fruit of his statement to the detectives,[15] and the record shows that in fact Brown, not Irby, provided the information through which the detectives found Whitmire. It is true that the affidavit supporting Whitmire's arrest warrant, issued by the commissioner on October 21, states as probable cause that Irby had confessed on October 20 and had named Whitmire as an accomplice, but the record shows that the police knew about Whitmire and were searching for him before Irby confessed. Brown named "Bee" as an accomplice on October 9—eleven days before Irby confessed—and took a detective to Whitmire's house and said that "Bee" lived there. A short time later, Brown told Whitmire that the police had his name and address. Moreover, on October 20 or earlier, the day Irby confessed, Whitmire's aunt telephoned Massachusetts to say that the police were looking for Whitmire and had a bulletin out for him. (Counterstatement, pp. 8-9, *supra*). That a "bulletin was out" showed that the detectives were looking for Whitmire in other states. In other words, the investigation had been successful enough for the detectives to know not only Whitmire's full name, but also that he had left the city. Moreover, the detectives had uncovered evidence to arrest Whitmire before appellant Irby confessed on October 20, for they had arrested Brown, who did not incriminate himself in his own written statement and presented him to the commissioner on October 19 (Counterstatement, p. 9, *supra*. It could be expected that the detectives, having learned Whitmire's nickname and address on October 9 from Brown, should have learned his full name and have

---

[15] Appellant Irby did attack Whitmire's testimony as being the fruit of Brown's statement, but he never joined appellant Jones in attacking the testimony as a fruit of his *own* statement. Counterstatement, pp. 11-12, *supra*.

been searching for him before October 20. With Brown's information as a starting point, eleven days is a long time to learn a name. Sometimes the police move slowly,—but, we respectfully submit, not that slowly. Therefore, neither Irby nor Jones has standing to raise the issue.

B. *Whitmire's testimony was not the fruit of appellant Brown's written statement.*

There is no merit to appellant Brown's contention (Brown Br. 23-32) that Whitmire's testimony was the fruit of Brown's unlawful detention. The record in this case precludes any argument that Whitmire's testimony was involuntary or induced by promises. On learning from Brown that the police had his name and address, Whitmire fled all the way to Massachusetts. Then, after hearing his aunt's warning that the police were searching for him and that running was no good, he turned around and came back to Washington where he knew he would be arrested. He made no effort to hide. Instead, in the city less than 24 hours, he went boldly to his girl friend's house where the police promptly arrested him. At police headquarters, he first denied the crime and then, after being advised of his rights, including his right to counsel, he confessed. His was not a reluctant confession, for the entire process—arrest, transportation to headquarters, oral statement, typing of written statement, and release—took less than four hours. (Counterstatement, pp. 9-11, *supra*). While in Massachusetts he had a change of mind, and although he never surrendered, he surely accommodated the police in every way. After the indictment was returned against appellants and as the case was continued from month-to-month, Whitmire continued to appear in court each time without any pressure from the Government. Sometimes, he would be told the continuance date in open court and receive no further notice; sometimes, he would telephone and inform the detective of the date (Tr. 540). These actions were fully consistent with Whitmire's statement at trial that he made his decision because, "I wanted to clear my conscience" (Tr. 398).

Moreover, as the excerpts of Whitmire's testimony in the Appendix show (pp. 39-44, *infra*), whatever had occurred before, the detectives in dealing with Whitmire meticulously observed the rules. The detectives made no promises, express or implied, and clearly told Whitmire that he was acting on his own (pp. 41, 42, *infra*). In fact, after giving his statement, Whitmire believed that he would be indicted; and at the trial he still did not know whether his turn to be prosecuted for the homicide was yet to come. And if he were prosecuted, he said, "I agree with it; if not, I still agree it." (pp. 41-42, *infra*). The excerpts from Whitmire's testimony in the Appendix, *infra*, are largely his spontaneous answers to questions during two rounds of exhaustive cross-examination by three separate attorneys. We respectfully submit that the Appendix represents as strong a showing as could ever be made that a human being freely made a choice—the same choice made by others many times before—to purge his conscience by admitting guilt and submitting to whatever might be the consequences.

In such circumstances, the legal issue is controlled by *Wong Sun* v. *United States*, 371 U.S. 471 (1963) in which the Supreme Court most recently formulated the standards to test whether the connection between specific evidence and police misconduct was sufficiently strong to require exclusion of the evidence as a "fruit of the poisonous tree." The Court said (371 U.S. at 487-488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Therefore, the Court expressly rules that the test for "fruits of the poisonous tree" is not a "but for" test.

Whitmire's testimony at trial was not a fruit of police illegality merely because there was a casual connection between Brown's statement and Whitmire's testimony, or merely because the police never would have found Whitmire "but for" Brown's statement. The test is whether Whitmire's testimony was produced by "exploitation of the illegality." Or, in different language used by the Court in *Wong Sun*, Whitmire's testimony was admissible if it derived "from an independent source" or if the link between the testimony and illegality had "become so attenuated as to dissipate the taint" (371 U.S. at 487).

In *Wong Sun*, the Court applied the test to the two defendants. As to the first, Blackie Toy, the Court held inadmissible as fruits of the poisonous tree (1) oral admissions made in his bedroom to agents during an unlawful arrest and (2) heroin to which Toy led the agents immediately after the unlawful arrest (371 U.S. at 484-488). But as to the second defendant, Wong Sun himself, the Court held that written statements which he gave on returning to the narcotics agents' office five days after his illegal arrest and four days after a magistrate had released him on personal bond (*id.* at 473-476), were not fruits of his illegal arrest (371 U.S. at 491). The court said (*ibid*):

> On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned *voluntarily several days later* to make the statement, we *hold* that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint." (Emphasis supplied)[16]

---

[16] The Court reversed Wong Sun's conviction because the record indicated that the trial court might have used evidence held inadmissible against Blackie Toy as corroboration for Wong Sun's written statement (371 U.S. at 492-493). The Court, of course, could not have reversed the conviction on that ground without first having held that the written statements were admissible, and as the quoted portion of the opinion shows, the Court expressly designated its ruling on the statement as a holding.

In other words, when actions of human beings are the alleged fruits of police misconduct, the taint is dissipated if several days elapse and if the human being acts voluntarily. The Supreme Court's holding as to Wong Sun's written statements controls this case because if Wong Sun's voluntary statement five days after the illegality was not a fruit, *a fortiori*, Whitmire's voluntary testimony at the trial thirteen months later was also not a fruit.[17]

Moreover, the decisions of this Court applying the *Wong Sun* rule lend further support to the admissibility of Whitmire's testimony. In *Smith (and Bowden)* v. *United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964), the case relied on by the trial court in ruling Whitmire's testimony admissible, this Court held that the testimony of an accomplice, whose name was obtained during unlawful detentions of the defendants, was too attenuated to be tainted by illegality. The Court said (117 U.S. App. D.C. at 3-4, 324 F.2d at 881-882):

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence.

The facts in *Smith (and Bowden)* were virtually identical with the instant case, the only difference being that the accomplice in *Smith (and Bowden)* initially refused to say anything to the police and refused to testify before the

---

[17] We emphasize that the challenged evidence in this case is not Whitmire's written statement when arrested on October 22, thirteen days after Brown's statement, but his testimony at trial thirteen months later.

grand jury. Whitmire, at first, showed a similar reluctance when he fled to Massachusetts, but as this Court observed in a later decision, the test of admissibility is not the witness' initial reluctance to testify but whether his decision to give evidence was an independent and voluntary act.[18] A finding of voluntariness does not require a showing that a person changed his mind. Indeed, in *Wong Sun*, the Court found voluntary action without any indication that Wong Sun was originally hesitant to give his statement. In two later cases, *McLindon* v. *United States*, 117 U.S. App. D.C. 283, 329 F.2d 238 (1964), and *Edwards* v. *United States*, *supra*, note 18, the Court applied the *Wong Sun* and *Smith (and Bowden)* test. In *McLindon* the Court wrote (117 U.S. App. D.C. at 286 n. 2, 329 F.2d at 241, n. 2):

> We do not read our decision in Smith v. United States and Bowden v. United States, [citations omitted], as holding that testimony may never be excluded, as that would contradict the well-established rule forbidding testimony as to visual and aural observations during an unlawful search, seizure, detention or wiretap.
>
> * * * *
>
> The opinion holds that—
>
> "The proffer of a living witness is not to be *mechanically equated* with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." 324 F.2d at 881. (Emphasis supplied)
>
> We agree. In each case the court must determine how great a part the particular manifestation of "individual human personality" played in the ulti-

[18] *Edwards* v. *United States*, 117 U.S. App. D.C. 383, 386, n.5, 330 F.2d 849, 852, n.5 (1964).

> mate receipt of the testimony in question. Indications in the record that mere knowledge of the witness' identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome.

In *Edwards*, the Court ruled accomplice testimony admissible in circumstances similar to the instant case.

Although not raised by appellants, nothing in *Smith (and Anderson)* v. *United States*, 120 U.S. App. D.C. 160, 344 F.2d 545 (1965), is to the contrary. That decision bears on a different issue from the one involved in the instant case. There, two witnesses testified that they bought a transmission from one of the defendants and later surrendered it to the police. Crucial to this testimony, which the Court held inadmissible as a fruit of police illegality, was evidence given by a police officer that the transmission produced by the two witnesses bore the same serial number as the number on a transmission that had been seen earlier in the defendant's car trunk during an unlawful search. The case, therefore, is analogous to *Williams* v. *United States*, 105 U.S. App. D.C. 41, 263 F.2d 487 (1959), in which the Court excluded a police officer's testimony about what he saw during an unlawful search. In such cases the taint is never dissipated because the content of the testimony is a description of what occurred during the search. Such testimony in effect, reproduces the unlawful search and brings it into the courtroom so that the jury can participate in it. That situation is entirely different from *Wong Sun*, *Smith (and Bowden)*, and the instant case where the content of the testimony at trial is independent of the misconduct. The claim in this case is not that the testimony at trial reproduced the illegality; rather, it is that, but for the illegality, the police never would have obtained the name of the witness who gave testimony totally unrelated to that il-

legality. The latter issue is controlled by *Wong Sun* and *Smith (and Bowden);* and on the record in this case, showing that thirteen months after any police misconduct Whitmire made a free and independent choice to testify, uninfluenced by promises or other exploitation of the misconduct, the taint was dissipated.[19]

---

[19] Although we think that *Wong Sun* and *Smith (and Bowden)* control the instant case, if we are wrong in our reading of those cases, we would respectfully ask the Court to remand for a *nunc pro tunc* hearing on the circumstances surrounding appellant Brown's statement rather than to hold Whitmire's testimony forever inadmissible and reverse Brown's conviction. We think that such a suggestion is proper in light of the manner in which the issues were framed below. The trial court, accepting the government's arguments—the same arguments that we present on appeal—relied on and considered itself bound by *Smith (and Bowden)* (Tr. 353-360, 414-415). Accordingly, the government offered no evidence to controvert appellant Brown's allegations of police misconduct, such evidence not being pertinent once it was settled that *Smith (and Bowden)* controlled, and the circumstances underlying Brown's statement were never explored. Moreover, the record is not completely without some support for the government's representatives at trial that Brown passd himself off as a willing informer who would lead the police to the murderers (Tr. 24-25). For instance, the content of Brown's statement supports that view (G. Ex. 5, which was identified as an exhibit and used but not received into evidence); Brown in fact was not held in custody and went home after giving the statement; and Brown admitted during the hearing that he "volunteered that [he] would be of any assistance to the [detectives] whatsoever" although, to be sure, Brown claimed that his offer was coerced (Tr. 339, 345-346). If it is true that the detectives did not engage in misconduct, it would be unfortunate in our view if Whitmire's testimony were held inadmissible solely because the trial court and the government misconstrued an earlier opinion of this Court, particularly since it is clear from the record that Brown could not be retried without Whitmire's testimony. However, to reiterate our position, we believe that *Smith (and Bowden)* does control the instant case and Whitmire's testimony was admissible irrespective of the circumstances under where Brown disclosed his identity.

II. Whitmire's testimony was not inadmissible because he moved to a new address after the list of witnesses was served on appellants. (Raised by all appellants).

(Tr. 29-34, 360-367, 388-391, 450-453, 458, 461, 498-500, 507-508, 539, 566-568, 618-619).

All appellants contend (Brown Br. 36-37; Irby Br. 10-11; Jones Br. 19-21) that Whitmire's testimony was inadmissible because at the time of trial he was no longer living at the address given in the list of witnesses served on appellants pursuant to 18 U.S.C. § 3432. The record shows that the capital list, containing the indictment, prospective jurors, and witness, was served on appellants on June 7 and June 10, 1965. The witness list gave Whitmire's address at 1235 C St., N.E., Apt. 203. Thereafter, as the date of trial was continued several times and the compositions of the jury panels changed, the government served new lists of prospective jurors on July 6, September 13 and November 2. No new list of witnesses was ever served before the trial began on November 16. The record shows that 1235 C Street, N.E., was the address of Whitmire's mother (Tr. 461), and that Whitmire had lived with her at that address until the summer months of 1965 (Tr. 458). He moved twice between the summer of 1965 and the time of trial (Tr. 458). Therefore, the witness list gave Whitmire's correct address when the government served it early in June.

When Whitmire was called to testify on the fourth day of trial, after six witnesses had already testified, appellant Jones's attorney moved to exclude the testimony because the address on the capital list was inaccurate (Tr. 360-367). Counsel said that the address on the witness list had been bad for sometime and that Jones's investigators had been unable to locate Whitmire (Tr. 361). Counsel would not object to the testimony of two or three other witnesses, whose addresses were also incorrect but whom the investigators had found (Tr. 363). Counsel further

represented that she had examined the marshal's return of the subpoenas, which showed that Whitmire's subpoena had been sent to him in care of a homicide squad detective (Tr. 361). Counsel admitted that she had known about the error for about one week but had never called the error to the government's attention or asked for the correct address (Tr. 362-363, 367). Counsel for appellants Brown and Irby joined the motion, and both stated that they had never asked the government to furnish the correct address. Appellant Brown's attorney had not discovered the inaccuracy, while appellant Irby's attorney had known it for a long time. (Tr. 364-366). Later in the trial, defense counsel contended that the government had prevented them from interviewing Whitmire during trial by posting two police officers at the door to the witness room (Tr. 388).

The purpose of 18 U.S.C. § 3432, requiring the government to serve a list of witnesses in capital cases three days before trial, "is to enable [the accused] to inquire into the testimony that he will be called on to meet, and to enable him to prepare his defense."[20] Objections to the list are deemed waived unless made before the jury is impaneled, or at least, before the first witness is sworn.[21] The right must be asserted at the beginning of trial because the remedy for a defective list of witnesses is not to exclude the witness's testimony, but to continue the trial until three days after the government serves a proper

---

[20] *Horton* v. *United States*, 15 App. D.C. 310, 320, *cert. denied*, 175 U.S. 727 (1899). *Accord, e.g., Logan* v. *United States*, 144 U.S. 263, 304 (1892).

[21] *Aldridge* v. *United States*, 60 App. D.C. 45, 47, 47 F.2d 407, 409 *rev'd on other grounds*, 283 U.S. 308 (1931). *Accord, Logan* v. *United States*, *supra* note 20, at 304-305, approving an English case that held the right was waived when not made before the jury was sworn. In *Gordon* v. *United States*, 53 App. D.C. 154, 156, 289 Fed. 552, 554 (1923), the Court said in a dictum that objection is timely if made before the challenged witness testifies and cited *Hickory* v. *United States*, 151 U.S. 303, 307-08 (1894). However, *Hickory* does not support the proposition.

list.[22] In the instant case, appellants waited until after six witnesses had testified, and therefore waived their objections.

In any event, appellants did not suffer prejudice.[23] Since appellant Brown did not even know that the address was incorrect, the preparation of his defense was not impeded. Nor can appellants Irby and Jones claim prejudice merely because Whitmire moved after service of the list of witnesses. A similar situation arose in *Horton* v. *United States*, *supra* note 20, where a witness moved ten days before service of the list and the Court held that the mistake was harmless.[24] To be sure, in *Horton*, defense counsel refused to represent that he had attempted to locate the witness, btu in the instant case counsel for Irby and Jones knew of the inaccuracy well before trial (at least about one week (Tr. 367)) and yet failed to call it to the attention of the prosecutor or trial court so that the matter could promptly be repaired. On the first day of trial, defense counsel asked the assistance of the court and the government in obtaining Whitmire's criminal record—because "I do know we want Whitmire"—which assistance was promptly rendered, but counsel was silent about the inaccuracy in the address (Tr. 29-34). Instead, counsel waited and mentioned the matter for the first time three days later, when Whitmire appeared to testify, in an effort not to obtain a three-day continuance but to

---

[22] *E.g.*, *Logan* v. *United States*, *supra* note 20, at 305; *Aldridge* v. *United States*, note 21, at 47; *United States* v. *Insurgents of Pennsylvania*, 26 Fed. Cas. 499, 514 (No. 15,443) (C.C.D. Pa. 1795).

[23] Defects in the capital list of witnesses are not grounds for reversal without a showing of prejudice. *E.g.*, *McNabb* v. *United States*, 123 F.2d 848, 853-854 (6th Cir. 1941), *rev'd on other grounds*, 318 U.S. 332 (1943).

[24] See also, *Holmes* v. *United States*, 56 App. D.C. 183, 186, 11 F. 2d 569, 572 (1926) (misspelling of witness's name); *Shaffer* v. *United States*, 24 App. D.C. 417, 432-433 (1904), *cert. denied*, 196 U.S. 639 (1905) (list deceptive as to identification of mother and daughter); *McNabb* v. *United States*, *supra* note 23 (testimony of witnesses, whose names were omitted from list, was cumulative).

exclude the testimony altogether, which, of course, was quite damaging to the defense. The facts of this case fit the mold of Judge Thomas W. Swan's famous statement, "The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create." [25] And this Court has held that if an accused discovers before trial that he has been misled by a mistake in the list of witnesses, he cannot wait until trial and ask for reversal but must apply before trial to the court or government for clarification.[26]

Finally, the record will not support the contention that the government hid Whitmire before or during trial. The error on the capital list was not deliberate; in fact, the list was correct when served. Whitmire moved several times, as did two or three other witnesses whose addresses were also incorrect (Tr. 363). Nor was Whitmire the only witness whose subpoenas were sent to the homicide detective, for he also received the subpoenas of Doris Carter and John Wilson, neither of whom testified at the trial (Tr. 539). Nor could it be argued that the government tried to hide Whitmire by sending the subpoenas to the detective; for honoring a request of defense counsel, the government arranged to have Doris Carter visit her husband in D.C. Jail, where he was waiting as a defense witness under a writ of *habeas corpus ad testificandum*, and as a result of her visit, she refused to testify as a government witness (Tr. 566-568). In fact, Whitmire

---

[25] *United States* v. *5 Cases, More Or Less, Containing "Figlia Mia Brand,"* 179 F.2d 519, 523 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950).

[26] *Shaffer* v. *United States*, *supra* note 24, at 433, where the Court said:

> If the accused had really been in doubt as to the matter and deemed it of importance to his defense, he could easily have applied to the court for direction to the prosecution officers to make the necessary correction in the list, and thus remove the difficulty,—a thing that the court, in its discretion, would readily have done, if there was reason to suppose that the accused was liable to be misled to his prejudice.

was not hiding at all because two weeks before trial he went to appellant Irby's house and visited Irby's mother (Tr. 453, 618-619). The police did not escort Irby to the courthouse. Each day he came by bus or in his wife's car, sometimes bringing his wife and children along (Tr. 498-499, 507-508). He was in the courthouse each day of the trial, although he was not in the witness room next to the courtroom (except on the day that he took the witness stand), but in the public witnesses's lounge on the third floor (Tr. 450, 452, 508). On the first day Whitmire was told that he could wait in the room next to the courtroom, but he asked detectives if he could wait in another place "where [he] wouldn't come in contact with a lot of people, so they told me I could wait in the waiting room downstairs" (Tr. 500). Detective Joseph O'Brien of the homicide squad was in Whitmire's company, and the detective was the next witness to testify after Whitmire (Tr. 452-453). When asked if he had told Whitmire and other witnesses not to talk to representatives of the defense, government counsel represented that he had informed all witnesses that "they may talk to them but they don't have to", except for Whitmire's pregnant wife, who was not a witness and who had complained that she was being "molested" by defense investigators, and government counsel advised her to tell the investigators that she would not talk to them. (Tr. 389-390). We submit that the error on the witness list was an administrative oversight, the kind that can easily escape the notice of prosecutors trying to juggle heavy case loads, and it would have been promptly cured if only the prosecutor had been aware of it.[27]

---

[27] Although not a matter of record, in the United States Attorney's Office the addresses for capital lists and subpoenas are obtained by the secretaries.

III. There was sufficient evidence to support the jury verdict. (Raised by appellants Brown and Jones).

(Tr. 189-194, 199, 203, 209-210, 214-215, 231-234, 242-243, 263-266, 273-275, 279-280, 288-290, 293, 299, 312-318, 322, 370-372, 419-485, 492-508, 511-517, 522-524, 526, 528, 541, 552-557, 575, 578-584, 1101-1102, 1146-1147).

There is no merit to the contentions of appellants Brown and Jones (Brown Br. 32-34; Jones Br. 22-26) that the evidence was insufficient to support their convictions. As the Counterstatement shows (pp. 3-4, *supra*), the accomplice Whitmire gave clear and convincing testimony that proved guilt overwhelmingly. Although it is well established that the jury can convict on the uncorroborated testimony of an accomplice,[28] in this case there was ample corroboration for Whitmire's testimony (Counterstatement, pp. 4-6, *supra*). Moreover, the trial court properly instructed the jury in the language requested by appellant Irby—who does not contest the sufficiency of the evidence on appeal—that accomplice testimony "may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by any other evidence. However the jury should keep in mind that such testimony is always to be received with caution and weighed with great care." (Tr. 1146; Irby request no. 6).

IV. The trial court did not abuse its discretion in denying appellants Irby and Jones separate trials. (Raised by appellants Irby and Jones.)

(Tr. 3-23, 101-106, 115-122, 178-187, 195-197, 441, 455-456, 506-507, 543-549, 589, 656-657, 697-698, 706, 940, 998-1000)

Appellants Irby and Jones contend that they were entitled to separate trials (Irby Br. 12-14; Jones Br. 27-28). Since the indictment alleged that all appellants par-

---

[28] *E.g.*, *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 243 F.2d 32 (1957); *McQuaid* v. *United States*, 91 U.S. App. D.C. 229, 198 F.2d 987 (1952), *cert. denied*, 344 U.S. 929 (1953).

ticipated "in the same act or transaction," they were properly joined under F.R. Crim. P. 8(b) in a single indictment. Thereafter, appellants Irby and Jones could obtain separate trials only by showing prejudice under F.R. Crim. P. 14. Motions under Rule 14 are addressed to the discretion of the trial judge, and his exercise of discretion will not be set aside on appeal unless clearly abusive.[29] "The general rule is that persons jointly indicted should be tried together," and "the mere fact that appellant[s] might have had a better chance of acquittal if tried separately . . . does not [establish] their right[s] to a severance." [30] In this case appellants Irby and Jones advance two reasons for severances, which our argument discusses in the paragraphs below.

A. *Appellants Irby and Jones were not entitled to separate trials merely because they wished to call each other and appellant Brown as defense witnesses.*

First, appellants Irby and Jones contend that the trial judge abused his discretion in denying separate trials because each wished to call his two codefendants as witnesses and none of the appellants chose to testify at trial. Irby presented this contention in a pre-trial motion supported by affidavits from Brown and Jones averring that neither committed the murder, neither was at the scene of the crime, and neither saw Irby on the day in question (see Motion filed June 28). Brown presented a similar argument before trial, but he does not raise the issue on appeal. Jones does raise the issue, but he never made

---

[29] *E.g., Opper* v. *United States*, 348 U.S. 84, 94-95 (1954); *Dykes* v. *United States*, 114 U.S. App. D.C. 189, 190, 313 F.2d 580, 581 (1962), *cert. denied*, 374 U.S. 837 (1963); *United States* v. *Bentvena*, 319 F.2d 916, 931-932 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). Joinder of defendants involves entirely different considerations from joinder of offenses. For joinder of offenses, see *e.g., Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

[30] *Dykes* v. *United States*, *supra* note 29, at 190, 581.

any such contention below until the third day of trial (Tr. 183-185). In fact, Jones's only request for severance at an earlier time was made orally on the first day of trial and was based on an entirely different ground (Tr. 8-9).[31] In any event, the contention lacks merit, for codefendants cannot obtain severances at will by merely alleging that they would like to call each other as witnesses to testify that they have no knowledge of the allegations in the indictment. Moreover, it is highly speculative to think that codefendants would exercise their self-incrimination rights at a joint trial but not exercise them at separate trials. Certainly, in the instant case, neither Irby nor Jones would dare call Brown as a witness in a hypothetical separate trial; for the government could impeach him with the prior inconsistencies in his written statement naming Irby and Jones as the murderers, which at a jury trial would be tantamount to suicide for Irby and Jones as they would lack standing to challenge the legality of Brown's prior statement.[32] The same would be true if Jones attempted to call Irby, who also confessed. In addition to these circumstances, the trial court's exercise of discretion was supported by the case law, which uniformly holds that the desire to call codefendants as witnesses is not an adequate reason for severance.[33]

---

[31] Jones's request for severance on the first day of trial was based on the possibility that prejudice would arise from introduction at the trial of Brown's and Irby's confessions, which is not an issue on appeal because the confessions were never offered into evidence (Tr. 8-9). In all fairness to Jones, however, it should be observed that his trial counsel was under the handicap of not having entered the case until eleven months after indictment and two months before trial. Still, we think that the contention now advanced on appeal could have been raised with the other contention on the first day of trial.

[32] *Long* v. *United States*, No. 19,073, D.C. Cir., April 15, 1966, slip opinion p. 5.

[33] *United States* v. *Ball*, 163 U.S. 662, 672 (1896) (one of three grounds alleged for severance); *Sagansky* v. *United States*, 358 F. 2d 195, 199-200 (1st Cir. 1966); *Gorin* v. *United States*, 313 F.2d 641, 645-646 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963); *cf. Olm-*

B. ***Nor were appellants Irby and Jones entitled to separate trials because appellant Brown's defenses were both innocence and insanity.***

Appellants Irby and Jones also contend that they were entitled to separate trials because appellant Brown's insanity defense prejudiced their defenses of not guilty. This contention, however, they did not present to the trial court until the trial was all but over. Before trial each of the three defendants received a mental examination at St. Elizabeths Hospital, which found each free of mental disease or defect. Accordingly, the trial court could not foresee which, if any, of the defendants would raise the insanity defense. Neither before trial nor on the first day of trial when severance motions were renewed did appellants Irby or Jones, who were in a better position than the court to know which defendants would claim insanity, request a severance because of Brown's insanity defense.

The trial began, and on the second day Brown staged a demonstration, purporting to throw a fit, which caused the court to stop the proceedings for five days so that the hopital could examine Brown and report to the court (Tr. 115-117, 121-122). The hospital concluded that Brown was malingering and had feigned his fit. After a full hearing on the question, the court went forward with the trial. At this point, appellants Irby and Jones requested severances because Brown's demonstration had prejudiced

---

stead v. *United States*, 19 F.2d 842, 847-848 (9th Cir. 1927), *aff'd on other matters*, 277 U.S. 438 (1928) (denying severance but distinguishable from instant case on its facts). *Compare United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965), the case on which appellants rely but which granted severance under entirely different circumstances. There, accused was tried jointly with a codefendant who at an earlier trial of a different cause had admitted his own guilt and had exonerated accused three times in open court. Government proved codefendant's admissions, but hearsay ruled barred accused from proving that the codefendant had exonerated him at the same time. In order to prevent the government from using the very evidence that the accused could not use and to give accused opportunity to call the codefendant as a witness in his own behalf, the court held that the accused was entitled to a separate trial.

them, because the doctors would not guarantee that Brown would not do it again, and because the government would rebut Brown's insanity defense with evidence of malingering (Tr. 178-187).

Brown did not repeat his demonstration, and later testified at a hearing out of the presence of the jury. He did raise the insanity defense, offering the testimony of two psychiatrists. He also raised the defense of not guilty, and no part of his insanity defense was inconsistent with innocence. The government introduced psychiatric testimony to rebut insanity, including evidence of malingering. Appellats Irby and Jones made no objection to any of the psychiatric evidence, and not until the end of the trial, when all parties had rested their cases, did they come forward and ask for severance because Brown's insanity defense had prejudiced their defenses of not guilty (Tr. 998-999).

As a matter of law, Brown's demonstration and the mere fact that he raised the insanity defense did not amount to such prejudice as to entitle appellants Irby and Jones to separate trials. The courts do not presume prejudice in the abstract under Rule 14. Severance under that Rule was available as a remedy only if appellants made a concrete showing of actual prejudice that the trial court could not cure by protective steps during the course of the trial and which outweighed the overriding interest in trying all defendants together.[34] The choice was not

---

[34] That an accused suffers some prejudice from evidence introduced against a codefendant is not in itself an adequate ground for a severance. *E.g., Delli Paoli* v. *United States*, 352 U.S. 232, 243 (1957) (admission of codefendant's confession naming accused as accomplice); *Opper* v. *United States, supra* note 29, at 94-95 (co-defendant's confession); *Dykes* v. *United States, supra* note 29, at 190, 581. Demonstrations by a codefendant in the courtroom is not a ground for severance as a matter of law. *United States* v. *Bentvena, supra* note 29, at 931-932. The insanity defense is not in itself such prejudice to the defense of not guilty as to require severance as a matter of law. *Cf. Holmes* v. *United States*, No. 19,678, D.C. Cir., May 16, 1966 (dicta) (trial court has *discretion* to order bifurcated trial of issues of not guilty and insanity in those cases where accused presents showing of actual prejudice).

an absolute one between appellants Irby's and Jones's suffering prejudice and their obtaining separate trials, for it was well within the trial court's discretion to order a joint trial and to make such provisions during the trial as would fairly protect the interests of all parties. Here, appellants have made no showing of actual prejudice. In fact, they remained silent during the psychiatric testimony and never asked the court to adopt measures to eliminate or mitigate any prejudice that might spill over from Brown's defense. A trial judge has broad leeway in balancing the interests of all defendants in a joint trial, but he cannot exercise his discretion in a vacuum without assistance from those whose interests are involved, and nothing in the record required him to act *sua sponte*.[35]

V. Government and defense psychiatrists properly explained the facts underlying their expert opinions by testifying to observations made by nursing assistants. (Raised by appellant Brown).

(Tr. 662, 671, 720-707, 710, 896-898, 949-956, 984)

There is no merit to appellant Brown's contention that the trial court improperly received hearsay evidence in allowing over objection the government psychiatrists, Drs. Owens and Economon, to testify to observations made by their nursing assistants (Brown, Br. 34-36).[36] Two psy-

---

[35] We note in passing that the record in this case strongly suggests that had appellants Irby and Jones entered objections to specific testimony, not only the court but also government counsel would have been disposed to honor their objections. Apparently, government counsel's trial strategy was to put in the accomplice Whitmire's testimony and then to protect his record against any prejudice that might cause reversal on appeal; for he showed an unusual willingness to withdraw evidence and to acquiesce in defense counsel's objections, even to the extent of reversing his position and siding with defense counsel on two occasions after the court had ruled favorably to the government (Tr. 195-197, 441, 455-456, 506-507, 543-549, 656-657, 697-698, 706, 940).

[36] Appellant Brown actually challenges only the testimony of Dr. Economon (Tr. 949-956), but Dr. Owens had given the same testimony earlier over the same objection (Tr. 896-898).

chiatrists testified for the defense. The one defense psychiatrist, Dr. Schwartz, testified at length about appellant Brown's life history. In response to questions asked by defense counsel, Dr. Schwartz indicated that his expert opinion was based on information taken by others when appellant was admitted to the hospital, information in a letter from the United States Attorney, the results of an intelligence test, the report of a social worker who had verified appellant's account of his life history, a report from Lorton Reformatory containing facts about appellant's life, the conclusions of a psychologist (which Dr. Schwartz read into the record verbatim), and the observations of nurses (Tr. 662, 671, 702-707, 710). The other defense psychiatrist, Dr. Welsing, also based her expert opinion on the results of psychological tests and the observations of nurses (Tr. 984). For the government, Drs. Owens and Economon testified, *inter alia*, that in their opinions some of appellant's symptoms were the product of malingering. Both explained their opinions by referring to observations by nursing assistants of appellant Brown's behavior at the hospital (Tr. 896-898, 949-956).

Whether appellant Brown's symptoms were produced by his malingering was properly the subject of expert opinion by psychiatrists. The ultimate determination, however, was for the jury, and the psychiatrists had a duty to explain in detail the underlying facts and information on which they based their opinions.[37] In fulfilling this duty, psychiatrists are not restricted to those facts that they personally observed; for in *Jenkins* v. *United States*, 113 U.S. App. D.C. 300, 304, 307 F.2d 637, 641 (1962) (*en banc*), this Court said that there are "cases which bar an expert's opinion based upon facts not in evidence unless it is derived solely from his own observations. But we agree with the leading commentators that

---

[37] *E.g.*, *Rollerson* v. *United States*, 119 U.S. App. D.C. 400, 401-407, 343 F.2d 269, 270-276 (1964), setting forth at length the facts that psychiatrists should bring out in court, including the patient's "day-to-day behavior" (*id.* at 403, 272).

the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession." [38] The observations of nurses were not only admissible but essential for the jurors to evaluate properly the testimony of psychiatrists for both the government and the defense.

VI. The witness Whitmire, after being fully advised of his rights, declined the court's offer to appoint counsel to advise him. (Raised by appellant Irby).

(Tr. 377-378)

There is no merit to appellant Irby's contention that the trial court should have appointed counsel to advise the accomplice Whitmire before he testified (Irby Br. 11-12). After being fully advised of the privilege against self-incrimination, Whitmire refused to accept the court's offer to appoint counsel (Tr. 377-378). Moreover, appellant Irby has no standing to assert Whitmire's rights under the Fifth Amendment. *E.g., Long* v. *United States*, No. 19,073, D.C. Cir., April 15, 1966, slip opinion p. 7.

---

[38] *Accord, Birdsell* v. *United States*, 346 F.2d 775, 779-780 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965); *Carrington* v. *Civil Aeronautics Bd.*, 337 F.2d 913, 916 (4th Cir. 1964), *cert. denied*, 381 U.S. 927 (1965); 3 Wigmore, *Evidence* § 688 (3d ed. 1940); McCormick, *Evidence* § 15 (1954). Moreover, the construction of the business records exception to the hearsay rule in *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 28, 254 F.2d 725, 731 (1957) (*en banc*), *cert. denied*, 356 U.S. 961 (1958), holds inadmissible reports of diagnostic opinion but not recorded observations of behavior or facts.

CONCLUSION

Wherefore, it is respectfully submitted that the judgments of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
THEODORE WIESEMAN,
Assistant United States Attorneys.

APPENDIX

Excerpts From Testimony of Willie B. Whitmire

Admonition by Court:

Mr. Whitmire, the Court wishes to advise you that if you wish, the Court will appoint counsel to represent you so that you may have the benefit of his independent advice as to certain matters that the Court and counsel will inquire into.

The Court also wants to advise you that you are not required to give testimony, and that anything that you say may be used against you if the Government sees fit to bring any case against you.

Now, would you like to have the Court appoint counsel to represent you so that you can consult with counsel independently at this time?

THE WITNESS: No, Your Honor.

THE COURT: Do you understand your rights?

THE WITNESS: Yes, I do, Your Honor.

THE COURT: You are not required to make a statement ,and anything you say may be used against you, if the Government decides to proceed against you.

THE WITNESS: Yes, I do, Your Honor. (Tr. 377-378)

* * * *

Direct examination at hearing:

Q. Now, Mr. Whitmire, why did you give a statement to the police officers concerning the death of Lonnie Page and those involved?

A. Well, because they was—there had been a murder committed and I knew I was somewhat involved and I wanted to clear myself (Tr. 394)

* * * *

Q. Now, did you give that statement voluntarily and of your own free will?

A. Yes, I did. (Tr. 395-396)

* * * *

Q. You had never gone to the police until the police came to you, isn't that correct?

A. That is right. (Tr. 397)

* * * *

Cross examination at hearing:

Q. You say you gave a statement because you wanted to clear yourself?

MR. BLACKWELL: He said his conscience, I believe, Your Honor.

MRS. ROUNDTREE: I believe—it is for the Judge to decide which is the recollection, I guess.

BY MRS. ROUNDTREE:

Q. What did you say, sir?

A. Well, I wanted to clear my conscience.

Q. Oh, you wanted to clear your conscience. Now, what was it that you told them that cleared your conscience?

A. I told them everything that happened. (397-398)

* * * *

Q. All right. Now, when they first asked you about your knowledge of this homicide, you denied any involvement in it, didn't you?

A. At first I did.

Q. Then they continued to ask you questions, didn't they?

A. No. They advised me of my rights.

Q. All right. They advised you of your right to have a lawyer?

A. Yes.

Q. Did you ask for a lawyer?

A. No, I didn't. (Tr. 405-406)

* * * *

Q. Did you speak to an Assistant United States Attorney on the date that you went to the Homicide Squad?

A. No, I didn't.

Q. Were any promises made to you at that time with respect to your being prosecuted for this homicide?

A. No. (Tr. 408)

* * * *

Q. All right. After you made this statement, did you still think you were under arrest?

A. Well, I didn't know.

Q. You didn't know. All right. Then they subsequently let you go, didn't they?

A. Yes, they did.

Q. Did they give you a reason why they let you go?

A. No, they didn't. They only told me that they couldn't promise me anything.

Q. They said they couldn't promise you anything?

A. They said, the onliest thing they told me was that they wouldn't make any promises to me whasoever.

Q. But they would do what they could?

A. They didn't say that.

Q. They didn't say that?

A. No.

Q. All right. But they let you go?

A. They let me go. (Tr. 409-410)

* * * *

Q. Mr. Whitmire, at this time are you on parole?

A. No, I am not. (Tr. 411)

* * * *

Cross-examination at trial:

Q. When you discussed this with the police, did you think that you were going to be indicted?

A. I had every indication that I would.

Q. That you were going to be?

A. Yes. (Tr. 437)

* * * *

Q. Are you afraid today? Are you afraid of Officer O'brien?

A. No.

Q. Are you afraid of Officer Eccles?
A. No.
Q. Are you afraid of the District Attorney?
A. No.
Q. Have they made you some promises?
A. None.
Q. None whasoever?
A. None. (Tr. 454-455)

* * * *

"Question. Then I take it you expect at some time to be prosecuted as these men are?"

MR. BACKWELL: If your Honor please, I submit that the question really should be rephrased.

MRS. ROUNDTREE: I don't know how else I could say it.

BY MRS. ROUNDTREE:

Q. Do you expect to be tried? Do you understand that?
A. Uh-huh.
Q. All right.
A. Well,—I don't know. If so, I agree with it; if not, I still agree with it.
Q. If so, you agree with it?
A. Yes.
Q. You would just plead guilty, then, I take it?

MR. BLACKWELL: If Your Honor please, I submit that is argumentative.

THE COURT: Sustained. That is argumentative. (Tr. 457)

* * * *

Q. And at the time, Mr. Whitmire, that you appeared before the Grand Jury, were you advised that you had, in fact, been named by the Coroner's Jury as one of those responsible for the death of Lonnie Page?

A. Well, If I am not mistaken, I believe I was told when they brought me—when they carried me before the Grand Jury that they wasn't promising me anything, anything I done, I was doing it on my own.

Q. Did they tell you as a result of your testimony you might very well be indicted for murder?

A. I don't think so. I don't remember. (Tr. 467-468)

* * * *

Q. And what was said with respect to the holding of the Coroner's inquest, the Coroner's Jury?

A. They only told me whatever they do when they go there, they told me it had happened.

Q. Yes. Did they say they had involved you? That you had been named as one of those responsible?

A. Well, I don't remember.

Q. You don't remember?

A. All I remember is him telling me that there was something happening at the Morgue.

Q. Did they tell you not to worry about it?

A. No, they didn't.

Q. Did they tell you it could result in your arrest and your being held without bond on first degree murder?

A. No, they didn't. (Tr. 469)

* * * *

Q. Now, Mr. Whitmire, when you went into police headquarters on the 22nd of October of 1964, did there come a time when anyone asked you whether you would be willing to testify against the three men in this case?

A. No, they didn't.

Q. Was there any discussion at all of your testifying?

A. No.

Q. None at all?

A. I only gave a statement and they asked me—I only gave a statement, the statement that I gave here in court. And I was told would I be willing to testify, to tell the truth about this thing in court. So I said yes. (Tr. 498)

* * * *

Q. Have you ever discussed this case with Mr. Blackwell?

A. No, I haven't.

Q. In that case, I take it he never advised you you

might be incriminating yourself by testifying? (Tr. 500-501)

A. No.

* * * *

Q. Mr. Whitmire, I understood that you testified for us yesterday one of the jobs you listed for us was obtained with the assistance of a member of the Police Department; is that correct?

A. No, ma'am, I didn't say that.

Q. What did you say?

A. If I am correct, I think you asked me had I ever received a job with any assistance. I think I said yes. Well, I was thinking that you were talking about have I ever received a job where I had to go through some employment office through some part of the Government. Well, I have: United States Employment Service that is located on the next corner.

Q. In other words, no one on Homicide has ever helped you get a job somewhere?

A. No, ma'am. (Tr. 502-503).

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 224446 18

BRIEF FOR APPELLANT

[redacted] 658

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

No. 19890

RHOZIER T. BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. Michael Cramer
H. Thomas Sisk

Attorneys for Appellant
Rhozier T. Brown by
Appointment of this
Court

May 1966

QUESTIONS PRESENTED

1. Did the Court err when it permitted Willie B. Whitmire to testify as a witness for the prosecution when his identity was the product of an illegal detention of two of the appellants?

2. Did the Court err in permitting a conviction to be rendered on the basis of the uncorroborated testimony of an accomplice?

3. Did the Court err in permitting a psychiatrist, who testified as a witness for the prosecution, to relate in his testimony what members of his staff observed about Appellant Rhozier T. Brown?

4. Did the Court err in not insisting on strict adherence to the dictates of the "Capital List" rule?

Page

CITATIONS

Cases

Statutes:

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

RHOZIER T. BROWN, Appellant,	)	
v.	)	Appeal No. 19890
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANT's BRIEF

Jurisdictional Statement

Appellant Rhozier T. Brown, Jr., was convicted by the jury of murder in the first degree in violation of 22-2401 D. C. Code 1961 Ed, and housebreaking in violation of 22-1801, D. C. Code 1961 Ed. (Record)

The Court sentenced appellant to life imprisonment. (Judgment and Commitment) Appellant was allowed, by the District Court, to proceed with this appeal without prepayment of costs. (See appellant's affidavit)

Counsel for Appellant Brown were appointed by this Court. (See order)

Statement of Case

Appellant and co-appellants, co-defendants below, John D. Irby and Robert L. Jones, were convicted of killing one Lonnie Page. The sole evidentiary basis for the conviction was the testimony of Willie B. Whitmire. [1] (Tr 377 to 506) Whitmire testified that in the morning hours of October 1, 1964, he accompanied Brown, Irby and Jones to the apartment occupied by Lonnie Page. (Tr 425) That after he observed Page leave the house with a woman, Brown and Irby entered through the rear door of Page's apartment and he and Jones followed. (Tr 425) That by the time he entered the apartment, he saw a little girl who was tied and had a covering over her head. That all four waited for Lonnie Page to return to the apartment. (Tr 425) When Page entered, he observed that Brown, Irby and Jones possessed pistols. (Tr 426) That Page threw a milk bottle at the appellants and was then shot. Whitmire did not know which of the

---

1 Trial Court noted the lack of probative value of other testimony. (Tr 385)

appellants fired the shot. (Tr 426)

Joyce Ann Windley, age 9, (Tr 221) testified that she lived with her mother in Lonnie Page's apartment. That on the morning of the killing, several men entered the apartment, tied her with venetion blind cord and placed a pillow case over her head. (Tr 231) She did not identify Appellant Brown as present in the apartment that morning. The only defendant identified by the witness as a participant in the murder was John D. Irby. (Tr 234)

Appellant Brown objected at trial to Whitmire's testimony contending that it was product of a statement, in the nature of a confession, unlawfully obtained from him. (Tr 353-360) In the nernacular, that Whitmire's testimony was "fruit from a poisoned tree."

As to his aforementioned confession, Brown testified, out of the presence of the jury, (Tr-325) that on October 9, 1964, he was requested to appear at the office of his probation officer. (Tr 327) That subsequent to the interview, he was met in the hallway by two Metropolitan Police Department officers.

Brown testified "(They) asked me would I mind coming to the Homicide Squad. I asked him was it mandatory. They said they advised it was best for me to come over." (Tr 327)

Brown testified that he entered the Homicide Office at about 10:05 a.m. and left at 11:00 p.m. (Tr 328) Brown testified that his confession was made approximately five hours after he was arrested. (Tr 339, 340, 341,342)

Brown testified that while detained, he was not permitted to make a requested phone call. (Tr 329) That during the period of detention, he supplied the police with the names of John D. Irby, Robert Jones and Willie B. Whitmire and "a fellow named Lowe" as participants in the murder. (Tr 330) Brown also told the police where Whitmire lived. (Tr 330) Brown testified (Tr 330) that the police asked him to arrange a meeting with Irby and Jones and was instructed to call the police when all three were together.

The government did not offer Brown's confession as evidence. (Tr 358) The government offered no

witnesses to rebut Brown's testimony concerning the circumstances under which his confession was made. The prosecutor admitted that Brown's confession was inadmissible. (Tr 561)

Willie B. Whitmire first testified out of the presence of the jury for the purpose of establishing the circumstances under which his knowledge of the facts of the crime came to the attention of the police. (Tr 389-390) Whitmire testified that the police made their initial contact with him at his house on Chapin Street, but that his statement concerning the murder was given at Police Headquarters where he was taken immediately after his arrest. (Tr 400) Whitmire testified that when taken to the Police Department, the arresting officers told him he was being charged with murder. (Tr 403) As to the amount of time spent with the police on the day his statement was taken, the following testimony was given by Whitmire:

> "Q All right. Now, when they took you down to the Homicide Squad, do you recall how long you were there before you made a statement?

"A It was -- it wasn't very much time -- between 12 and 5.

"Q I am sorry, I don't understand your answer.

"A It was between 12 and 5.

"Q Twelve noon?

"A It was some time in the afternoon. I know that I wasn't there after 5.

"Q They released you after 5?

"A Yes, they did." (Tr 406-407)

Whitmire testified that the questioning officers advised him of his rights at the time of questioning, (Tr 406) but apparently the questioning was not preceded by presentment before a legal officer.

Counsel introduced into evidence, as Defendant's Exhibit No. 2, a warrant and accompanying affidavit, issued by the United States District Court for the arrest of Willie B. Whitmire. (Tr 414) Exhibit No. 2, in pertinent part, contains the following statements:

"On Tuesday, October 20, 1964, John DeShields Irby, negro, age 26 years, residing at premises #15 S Street, N. E., Washington, D. C., was

arrested for this robbery and murder. He admitted being present and his participation in this robbery and murder.

"John DeShields Irby named Willie B. Whitmire, negro, age 26 years, formerly residing at 1906 Vermont Avenue, N. W., Robert Loran Jones, negro, age 20 years, and Rhozier T. Brown, negro, age 22 years, as his accomplices in this robbery and murder."

Thus, John DeShields Irby's confession on October 20, 1964, followed Rhozier Brown's of October 9, 1964. The government did not offer Irby's confession into evidence. The prosecutor admitted that Irby's confession, as well as Brown's, was inadmissible "under the Mallory Rule". (Tr 561)

During the course of the trial, counsel for appellants brought to the Court's attention, the fact that Willie B. Whitmire's current address was not supplied by the government on the capital list. (Title 18 Sec. 3432 U.S.C.) (Tr 360-364) The Court denied the appellants' motion to strike Whitmire's testimony because appellants' trial counsel did not

demand that the government supply a current address after they learned that he was not at the given address. (Tr 364)

Counsel argued that the instant case was distinguishable from Smith v. United States 114 U. S. App. D. C. 1, 324 F. 2d 879, and that Whitmire should be precluded from testifying. The Court denied Appellant Brown's motion. (R 419)

Aside from the testimony concerning the admissibility of his confession, (Tr 325-368) Appellant Brown did not testify on his own behalf. His defense consisted of a denial, by his plea of not guilty of participation in the offenses charged, and alternatively, he defended on the grounds that the crime was a product of a mental disorder. (Tr 609-612)

Dr. William Schwartz, a qualified psychiatrist, reviewed Appellant Brown's background (Tr 663-666) and testified that if Brown participated in the offenses charged, that participation would have been a product of a mental disorder, to wit, emotional instability. (Tr 666) Dr. Francis C. Welsing, a psychiatric resident at St. Elizabeth's Hospital,

diagnosed Appellant Brown's condition as emotional instability. (Tr 934) He testified that if Brown committed the offenses charged, his crime was a product of his mental disorder. (Tr 984-985)

In rebuttal to Appellant Brown's medical witnesses, the government elicited testimony from Dr. Mauris M. Platkin and Dr. Straty H. Economon. The essence of their testimony was that Appellant Brown was not suffering from a mental disorder on the date of the murder. (Dr. Platkin Tr 911) (Dr. Economon Tr 960)

At one point during the testimony of Dr. Economon, the government's counsel sought to prove that Appellant Brown was feigning psychiatric symptoms. The following transpired in this regard.

"Q (By the Prosecutor) Have you formed an opinion of whether or not this defendant was malingering at any time when you examined him at the hospital, Doctor?

"A There is no doubt in my mind but that Mr. Brown has a lot of malingering about him. May I give an example which is quite dramatic at this point?

"MR. STEIN: I object, Your Honor, unless he saw what took place.

"THE WITNESS: I did not see it. One of my in charge nursing assistants, I am sorry.

"THE COURT: Counsel may approach the bench. (At the bench:)

"THE COURT: The Court feels that since all the psychiatric diagnosis is to a degree based on records and the reports of other that this is a proper area in which he may express an opinion based on what he has learned in connection with his responsibility to supervise this patient.

"I understand your position. I think, however, to rule the psychiatrist can testify only as to what he personally knew would limit their opportunity for diagnoses. Ss (sic) you recall in our conference yesterday on this same subject, it was pointed out that your psychiatrist, Doctor Schwartz, relied on the Lorton notes, and of course that is what somebody else wrote down.

"MR. STEIN: My objection, Your Honor, is that he is now picking out a specific illustration,

that is, I presume a nurse saw this man wink at a co-tenant in St. Elizabeths. He has given his opinion that the man has malingered. Now for him to give specific hearsay illustrations, would be like someone testifying as to character, giving specific illustrations. The doctor has given his opinion. I think --

"THE COURT: Well, of course the Court of Appeals has made it clear from the Carter case on down, that courts should go behind labels, schizophrenia or something else, and to go into the disease in all its dynamics, as they put it. And therefore it is the back-up data which seems to be important to us in our investigation of this particular subject, rather than the ultimate conclusion. The word "malingering" is a word that is common to all of us. He says it is also part of the psychiatrist's technology of labels, but I am not so much interested in what this doctor says which concerns the ultimate label as I am the reason on which he basis it. Now, sometimes those reasons are good and

sometimes the reasons are very sketchy. Certainly it would seem to me the more we go into it the more likely we are to afford a basis, a proper basis for the jury to draw a conclusion on this thing. Certainly if it is very sketchy it gives you the opportunity of attacking the conclusion. And I think we should go into it.

"MR. STEIN: Just one point I would like to make, Your Honor, for the purposes of my objection. Not arguing with the Court after a ruling. It is our position that malingering is not a scientific conclusion that this doctor is giving. He is giving malingering as an opinion that this man doesn't tell the truth. That is a moral issue, whether this man is telling the truth or not.

"THE COURT: Well, of course in that regard, some psychiatrists could take the position that they were not in a position to render an opinion. Some can. As the Court of Appeals made it clear, some psychiatrists feel that they cannot express an opinion on the right and wrong test, others can.

I think Doctor Platkin did as a matter of fact. Some absolutely refuse to go into the moral issue involved in the right and wrong. Others feel they can. Now here this man has expressed an opinion on this. Of course you are going to have a very full opportunity of checking his conclusions by asking him many pertinent questions that I know you have in your mind.

"MR. STEIN: I think the point is preserved.

"THE COURT: Surely.

(End of the bench conference.)

"BY MR. BLACKWELL:

"Q Doctor, do you remember the question that I asked you? That you were about to answer?

"A Would you repeat it, please?

"You mean about the malingering?

"Q Yes. Proceed to answer that, please.

"A Well, in my opinion, from my own personal observations, as well as from the observations of my nursing staff, which serve as my eyes and ears on my four wards --

"MR. STEIN: I object to that characterization,

Your Honor.

"THE COURT: Overruled.

"A I am not being facetious when I say that. My nursing staff do serve as my eyes and ears on the ward. They are professionally trained people. It is my opinion that Mr. Brown in large measure malingers, willfully puts on some of the behavior that he displays; not only in the hospital but behavior that I have observed in the courtroom, and in the cell block of this building.

"I would like to give a striking example, which I think will illustrate what I mean. Mr. Brown was admitted for the third time by order of this Court because there was some question about his ability to carry through with this trial. He was sitting with a fixed look in his eyes, rather stiff, uncommunicative, and the Clinical Director, Doctor Owens, and I came down immediately to the court and saw Mr. Brown. It was quite evident that he was literally stiff. His muscles were quite tense. Only by the most forceful questioning, by shaking him, could I get

any response at all. And Yet I knew that Mr. Brown was aware of everything that was going on. There was nothing wrong with any input of sensory information. It was just that he could not or did not come out with too much back to us. We felt that the boy was scared, and recommended to the Court that he be sent back to St. Elizabeths so that we could see what was going on and perhaps relieve some of this fright.

"That evening Mr. Brown was first in chow line on his crutches, which tells me something also. A person who is out of it emotionally would not be first in chow line. He goes into the dining room, which is separated from another dining room just by a serving line. There he was greeted by several young men who are our patients, who know Mr. Brown.

"Q Now, Doctor, before you go any further, I would like to know whether you saw this or whether this is information you have received.

"A Now, this part was information which I received from my senior nursing assistant on the ward.

"Q Very well. Proceed.

"A Mr. Brown went into the dining hall and was greeted by these other young men from across the way. The distance is not too great. They said something like, "Hi, Rhozier. What are you doing back?" Mr. Brown, proceeding on his crutches, winked at them gave them a wink and then went and got his food.

"This is a far different picture -- this was minutes after he was readmitted for the third time. Indeed, I was present when he came in and I could see a more relaxed person, three hours later. It was about three hours between the time we saw him in the courtroom and the time -- No, perhaps more. I should say five hours, between the time we saw him in the Court building and the time he was readmitted. He was already more relaxed because he knew that he was coming back to the hospital. I gave him, by injection, some muscle relaxant, to just get the stiffness out of his muscles, because he was so tense. And then I gave him, for the short time that he was there, some very mild

tranquilizer, Milltown, chosen specifically because it itself is a relaxant of skeletal muscles. People with whiplash injuries, for example, take this, because it does have a relaxing effect. At any rate, the whole point of the story is that he was very relaxed.

"At first he didn't communicate on the ward and I instructed the staff that they are not to understand any non-verbal communication, and that he be forced literally to communicate verbally. After Mr. Brown realized this, and he was told this by the staff, he started talking, asking for his toilet needs to be satisfied, toothbrush, comb, things like that. On the ward he was fairly much relaxed and he participated a little bit. He kept mostly
/to himself. But when Doctor Owens and I called him down, he started stiffening up again. We had to tell him. Gradually, over the three or four days that he was there, however, he was able to be pretty much relaxed in our presence.

"Finally, on Sunday evening, and I was on duty that weekend fortunately, it was a long weekend

that he was admitted, I told him that he had to return back to the custody of the Court no later than nine o'clock the next morning, Monday. As soon as I told him this, he got much more stiff. And then I reminded him that he already knew this because I had told the nursing staff to mention it to him several hours before in order to prepare him. And when he knew that I knew, he relaxed a little bit more. As we talked, and we had several long talks, including the occasion of the physical examination, Mr. Brown alternately was relaxed and tense. This was determined usually by the content of what was being discussed. I told him in substance that we were all aware he had a frightening ordeal ahead of him, a trial for a first-degree murder, that he was sent here by the Court, he was in the Court's custody and that he had to be a man.

"MR. STEIN: I object to this, Your Honor. Again, this is getting into an area of this doctor's counseling with my client, out of my presence, as overtone --

"THE WITNESS: He was my patient.

"MR. STEIN: May we approach the bench?

"THE COURT: Wait a minute, Doctor.

"Yes.

The jury found Appellant Brown guilty of first-degree murder under Count One of the indictment, and guilty of housebreaking under Count Three of the indictment. Count Two, charging a common law murder, was dismissed by the government. Appellant Brown was sentenced to life imprisonment. (Judgment and Commitment)

STATEMENT OF POINTS

1. The police took statements from appellants Brown and Irby in violation of Rule 5(a) and (b) of the Federal Rules of Criminal Procedure.

2. The police learned of Whitmire as a result of the statements given by Brown and Irby.

3. Whitmire's testimony was the only evidence in support of Brown's conviction.

4. The circumstances surrounding Whitmire's statement and his subsequent treatment by the government tend to make his testimony unreliable.

5. A government psychiatrist was allowed to give crucial testimony concerning Brown's mental condition when such testimony violated elementary rules of evidence.

6. The government did not adhere to the required strict demands of the "capital list" rule.

SUMMARY OF ARGUMENT

The police learned of Whitmire's identity through Brown's and Irby's patently illegal statements. Thus, Whitmire's testimony was the fruit of the "poisonous tree". To present, this Court has drawn a distinction between animate and inanimate objects learned of as a result of an illegal confession. It is submitted that this is a distinction without a difference. That the purpose of the exclusionary rule is to deter unlawful conduct by the police themselves. And, that the purpose of the rule is not fulfilled when the aforementioned distinction is applied.

The Court erred in admitting testimony designed to convince the jury that Brown feigned

mental disorder for the purpose of winning an acquittal, when the said testimony was plainly hearsay.

The Court erred in allowing Whitmire to testify when the government failed to supply counsel with his current address. This requirement of the capital list was particularly important in view of the fact that Whitmire supplied the sole, and uncorroborated testimony in support of Brown's conviction.

THE POLICE LOCATED WHITMIRE THROUGH BROWN'S CONFESSION WHICH WAS OBTAINED IN VIOLATION OF RULE 5(a) and (b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The police found Whitmire by use of an admittedly illegal confession taken from Irby and found Irby by an equally admitted illegal confession obtained from Brown. (Tr 561) This chain of events demonstrated the importance of Brown's confession and how it was gained by the police. Brown's confession was in fact the vehicle by which the police supposedly solved the case.

Appellant Rhozier Brown made his confession to the

police during a period of detention lasting approximately 13 hours. (Tr 328) His interrogation started in the late morning at 10 a.m. of a weekday: He was "picked up" in the building which houses this court. (Tr 327) Ironically, he was taken into custody when he was across the hall from the office of the United States Commissioner. (Tr 327) His 13-hour interrogation was conducted less than 2,000 feet from the office of the United States Commissioner and the District of Columbia Court of General Sessions. (Tr 328)

The police did not obey Rule 5(a) of the Federal Rules of Criminal Procedure which in pertinent part provides:

> "(a) Appearances before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any nearby officer empowered to commit persons charged with offenses against the laws of the United States.
>
> "(b) Statement by the Commissioner. The Commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used again him..."

Appellant Brown was "arrested", in the legal context, when the officers first stopped him. Analogous to the facts of the instant case is Morton v. United States, 79 U. S. App. D. C. 329, 147 F. 2d 28, where this Court held that an arrest had taken place when the defendant was informed by the police officers that their inspector wanted to talk to him and the defendant was then taken to a police automobile. And, in Ponce v. United States, Mun. App. D. C. 119 A 2d 718, the Municipal Court of Appeals for the District of Columbia, at page 719, said:

> "The word 'arrest' has a well-defined meaning, the essence of which is a restriction of locomotion or a restraint of the person. In Long v. Ansell, 63 U. S. App. D. C. 68, 71, 69 F. 2d 386, 389, 94 ALR 1466, it was pointed out that:
>
> > ...the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time."

The law imposes an evidentiary sanction which excludes confessions obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. Upshaw v. United States, 335 U. S. 410 (1948). Of course, the exclusionary rule also applies to reenactments of the

crime, Naples v. United States, 113 U. S. App. D. C. 281, 307 F. 2d 618 (1962), and tangible evidence, Watson v. United States, 101 U. S. App. D. C. 350, 249 F. 106 (1957).

The next question here reached is whether the period of detention was unlawful. This question must be answere affirmatively in the light of Mallory v. United States, 354 U. S. 449 (1957). In the Mallory case, the period of detention commenced at 2:30 in the afternoon. And a series of confessions were made between 10 p.m. and 12:30 a.m., and the defendant was presented to the magistrate the next morning. The Court held that the confessions were improperly admitted at trial and stated, at page 454, that:

> "The arrested person may of course, be 'booked' by the police. But he is not to be taken to Police Headquarters to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> "The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction

of a confession. (Emphasis supplied)

The interrogation period of Appellant Brown clearly consumed a longer period of time than the normal interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate. Mallory v. United States, 354 U. S. 449, 453, (1957). Therefore, the confession was patently inadmissible. Counsel believes that the government's failure to use the confession is an accurate indication of its legal validity. Of course, the prosecutor candidly stated that the confession was inadmissible.

Precluded from using the confession as evidence of Appellant Brown's guilt, the government did indirectly what they could not do directly. They used the content of the unlawful confession to obtain evidence of Brown's guilt.

II

THE TRIAL COURT SHOULD HAVE EXCLUDED WHITMIRE'S TESTIMONY AS IT WAS THE PRODUCT OF BROWN'S UNLAWFULLY OBTAINED CONFESSION.

Of course, a confession obtained as a result of an illegal arrest may be excluded as the "fruit of the

poisonous tree" growing from violation of the Fourth Amendment of the United States Constitution. The landmark case in point is Wong Sun v. United States, 371 U. S. 471 (1963). There the Court found that the defendant's arrest was made without probable cause, and said:

> "Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officer's action in the present case is nc less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. Lee Nueslein v. District of Columbia, 115 F.2d 690.
>
> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."
> (Emphasis supplied)

Morecver, not only information directly obtained by an illegal detention but alsc the product of information so obtained must be excluded from use at trial. Illustrative is Killough v. United States, 114 U. S. App. D. C. 305, 315 F. 241 (1962) Killough was arrested by the police for the strangulation death of his wife. The accused was retained in the custody of the police for 34 hours, during which time he confessed to being the murderer. This confession was held to be

inadmissible as procured in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. Killough was then taken before a magistrate who advised him of his right to counsel and not to make a statement.

On the following day, the officer who had participated principally in obtaining the inadmissible confessions the day before, obtained an oral confession which the Trial Court admitted in evidence. This Court reversed the conviction ruling that the second confession was inadmissible as the "fruit of the first confession." The court held that to admit the second confession would, in effect, admit the earlier confession that was inadmissible. The Court's decision was further explained in the concurring opinion of Judge Wright, at page 250:

> "For to quote Justice Jackson again, no matter what prompted the first confession, the suspect who has once 'let the cat out of the bag' knows that 'he can never get the cat back in the bag'. United States v. Bajer, 331 U. S. 540, 67 S Ct. 1398. While the psychological helplessness that comes from surrender need not last forever, I think the burden should be on the government to show that a second confession did not spring from a mind in which all mechanisms of resistance are still subdued by defeat and the apparent futility of further combat. And I do not think the admonition required by Rule 5(b) is likely to

> convert spiritless despair to alert vigilance in a suspect whose secret is already out."

In Bynum v. United States, 104 U. S. App. D. C. 368, 262 F. 2d 465 (1958), this Court ruled that fingerprint specimens obtained from a defendant during a period of illegal detention should not be admitted. The Court, at page 369, said:

> "It is well settled that an article taken from the person of an individual on the occasion of an illegal arrest is not admissible in evidence against him although it is relevant and entirely trustworthy as an item of proof."

And, in United States v. Di Re, 332 U. S. 581, counterfeit gasoline ration coupons, seized after an unlawful arrest without a warrant, was held to be inadmissible evidence on the ground that the coupons were the fruit of the poisonous tree.

In United States v. Klapholz, 230 F. 2d 494 (2d Cir. 1956), evidence obtained from a search of the defendant's New York apartment and safe deposit box as a result of information obtained during a period of illegal detention, was deemed inadmissible as the fruit of the poisonous tree.

The rationale of the decisions suppressing evidence learned of and seized as a result of an illegal detention is uniform. "The purpose of the exclusionary

rule is to deter -- to compel respect for the Constitutional guarantee in the only effectively available way -- by removing the incentive to disregard it..." Mapp v. Ohio, 367 U. S. 643, 656 (1961).

The contemporary philosophy of confession suppression has recently been articulated by the Supreme Court in Escobedo v. State of Illinois, 378 U. S. 478 (1964). Speaking for the Court, Justice Goldberg, at page 488, said:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said: 'Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitation of that power.
>
> 'The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, -- that is the confession of guilt. Thus, the legitimate use grows into the unjust abuse; ultimately, the innocent are

jepardized by the encroachment of a bad system. Luck seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence

"This Court also has recognized that history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence..." Haynes v. Washington, 373 U. S. 503, 519, 83 S Ct. 1336, 1346. [1]

Smith v. United States, 117 U. S. App. D. C. 1, 324 F. 2d 879 (1963), relied on by the prosecution, involved a factual setting apparently similar to the one in the instant case. One Holman, a participant in the crime, testified and implicated the defendants. This Court held that testimony by an eyewitness to a crime should not be necessarily excluded where the identity of the witness was discovered during an illegal detention. In Smith the Court held that a distinction must be drawn between animate and inanimate objects. That the "fruit of the poison tree" doctrine is inapplicable to the discovery of animate evidence.

---

1 Under the orthodox principle, confessions were admissible and highly favored when given under circumstances where no wrongful inducement to make it existed.

"A confession, if freely and voluntarily made, is evidence of the most satisfactory character." Hope v. Utah 110 U. S. 574, 584 (1883)

(But see foctnote 2, page 286 at McLindon v. United States U. S. App. D. C. 283, 329 F. 238.)

Since the purpose of the exclusionary rule is to deter the abominable "secret interrogation", counsel submits that it is incongruous to base the exclusionary distinction on the nature of the object, i.e., inanimate and animate objects learned of during the secret interrogation.

Another aspect of the Smith case is the relationship between the illegal confession and the testimony of the witness whose identity was discovered as a result of the confession. In the Smith case, the Court noted that the relationship between the confession of co-defendant Bowden and the testimony of Holman was "attenuated", or slender. As stated by the Court in support of its conclusion, "...when initially located, Holman gave no information adverse to (Defendants Bowden and Smith); only after reflection and the interaction of these faculties of human personality did Holman eventually relate to the jury the events of the night of the killing."

According to Holman, he decided to testify because

"I used to think about it at night all the time... Because I kept thinking about the man, the man dead." (Smith Record 629)

The Court, at page 3, observed:

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give."

Counsel contends that the relationship between Brown's confession and Whitmire's testimony was not attenuated, but direct and strong. Brown made his patently illegal confession on October 9, 1964. (Tr 327) That in the course of the confession, he named Irby, Jones and Whitmire. (Tr 330) As shown by Defendant's Exhibit No. 2, Irby was arrested on October 20, 1964 and implicated Whitmire. As shown again by Defendant Brown's Exhibit 2, a warrant for the arrest of Willie B. Whitmire was issued on October 21, 1964. Nothing in the record shows the exact date on which Willie B. Whitmire was arrested. However, he states that when arrested by a lot of

detectives (Tr 402), he was told that he was being charged with the murder of Lonnie Page. (Tr 403) When arrested, he denied participation in the crime but during the course of interrogation by the police, which immediately followed the arrest, Whitmire admitted participation in the murder and gave the police a statement implicating the three appellants. (Tr 409) Exhibit 2 further shows that soon after he gave his statement to the police, the warrant for his arrest was cancelled by the United States Attorney.

Unlike the Holman testimony in the Smith case, it can not be stated that Whitmire's testimony was the product of a "burdened conscience." Whitmire's reason for giving the confession is stated on page 394 of the transcript:

> "Q Now Mr. Whitmire, why did you give a statement to the police officers concerning the death of Lonnie Page and those involved?
>
> "A Well, because they was -- there had been a murder committed and I knew I was somewhat involved and I wanted to clear myself."

The fact that Whitmire was not indicted for this crime,

although he is clearly guilty of murder, the fact that his confession was made while in police custody and under police questioning and that he was released after making the statement, raises the unmistakable aura of a confession made under pressure accompanied by the incentive of a government compromise.

On the basis of the foregoing, it is submitted that the facts of the instant case are distinguishable from those in Smith v. United States.

III

THE CONVICTION SHOULD BE REVERSED AS IT WAS BASED SOLELY ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellant was convicted on the uncorroborated testimony of an accomplice. In McQuaid v. United States, 91 U. S. App D. C. 229, 198 F. 2d 987, this Court held that a defendant could be convicted on the uncorroborated testimony of an accomplice, provided the trial court instructs the jury that such testimony "should be received with caution and scrutinized with care." In the instant case, the trial court properly instructed the jury as to the weight to be given to Whitmire's testimony and the caution with which it

should be received.

Our court's recognize that accomplice testimony tends to be unreliable. As stated by Judge Bazelon in Bishop v. United States, 100 U. S. App. D. C. 88, 243 F. 2d 32, at page 90:

> "If we look askance at accomplice testimony, it is because we recognize that it is less likely than other evidence to be true."

Counsel submits that this is a proper case for review of the accomplice testimony doctrine. Whitmire gave his statement to the police without prior benefit of counsel, without being brought before a U. S. Commissioner and while in the Homicide Office of the Police Station. It can readily be assumed that the confessions of Brown and Irby, in which he was named as a participant, were exhibited to Whitmire before he gave his statement. The fact that Whitmire was not indicted for murder, although he admittedly participated in it, indicates that he gave the statement under an express or implied "understanding" as to the consequences of his testimony. The totality of the circumstances of Whitmire's confession cause one to speculate as to whether Whitmire's testimony was

solely the product of his own observations.

IV

THE GOVERNMENT'S PSYCHIATRIST SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AS TO WHAT MEMBERS OF HIS STAFF RELATED TO HIM.

Dr. Economon was permitted to testify as to observations made by members of his staff (Tr 949-956) when he admittedly did not observe the matter about which he testified. (Tr 949)

The objectionable testimony tended to substantiate the government's contention that Appellant Brown feigned mental illness for purposes of this case. This testimony had a clearly prejudicial effect upon Appellant Brown's case and is of sufficient gravity to warrant the granting of a new trial

The common law has been exacting in its insistence that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact he testifies to. Barnett v. Aetna Life Insurance Co., 139 F. 2d 483, (C.C.A. J.J. 1943), Fredricksen v Fullmer, 258 P. 2d 1155 (Idaho 1953). The Uniform

Rules of Evidence, Rule 19, in pertinent part, provides:

"PREREQUISITES OF KNOWLEDGE AND EXPERIENCE."

"As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof..."

The disputed testimony of Dr. Economon is further objectionable on the grounds of hearsay. Hearsay evidence is:

"... testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter." McCormick, Evidence, 1954 page 460

The fundamental objection to admission of hearsay evidence is that it is not subject to the safeguard of cross-examination. N. L. R. B. v. Imparoto Stevedoring, 250 F. 2d 297 (CA 3d 1958)

Hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who can speak from their own knowledge. Queen v. Hepburn, 11 U. S. 290, 3 L. Ed. 348, affirming 2 D. C. 3. In the instant case, the parties who allegedly observed Appellant Brown

feigning his mental illness were located at the St. Elizabeths Hospital. They could have easily been brought before the Court to testify as to their observations.

In conclusion of this argument, counsel respectfully submits to the Court that the testimony of Dr. Economon as to what members of his staff told him is objectionable and should have been excluded on two grounds: The rule requiring firsthand knowledge, and the hearsay rule.

V

THE TRIAL COURT ERRED IN PERMITTING WILLIE B. WHITMIRE TO TESTIFY WHEN HIS CURRENT ADDRESS WAS NOT PROVIDED IN THE CAPITAL LIST.

The government supplied, on the "Capital List," the name of Willie B. Whitmire as a witness they intended to produce to prove the indictment. His address was given as 1235 C Street, N. E. Apt. 203, Washington, D. C. (See Capital List) Whitmire testified that his current address was 6318 Seventh Street, N. W., Washington, D. C. (Tr 458) and that he had lived there approximately two months before the

trial. Title 18 U.S.C. § 3432 provides:

> "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Of course, the requirement that defendant be furnished with a proper Capital List is mandatory and the government's failure to comply with this procedure constitutes error. Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, McNabb v. United States, 123 F. 2d 848 (Teen. 1941) reversed on other grounds 318 U. S. 332.

Since trial counsel contended that they were prejudiced by the government's failure to properly supply the names and addresses of their witness, i.e. Whitmire, the trial court erred when it refused to strike Whitmire's testimony.

CONCLUSION

For all of the reasons hereinabove set forth, the conviction should be reversed.

Respectfully submitted,

M. Michael Cramer

H. Thomas Sisk
Suite 766 Executive Building
15th & L Streets, N. W.
Washington, D. C.

Acknowledgment of service

Service of a copy of the within Brief is hereby acknowledged this day of May 1966.

For Office of the
United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,890

RHOZIER T. BROWN, JR., APPELLANT

vs

UNITED STATES OF AMERICA, APPELLEE

NO. 19,891

JOHN D. IRBY, APPELLANT

vs

UNITED STATES OF AMERICA, APPELLEE

NO. 19,892

ROBERT L. JONES, APPELLANT

vs

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DOVEY J. ROUNDTREE
Attorney for John D. Irby

Edgerton

QUESTIONS PRESENTED

I.

Whether it was error for the trial Court to permit the witness Whitmire to give testimony when his existence and identity were the direct result of statements extracted from the defendant Brown during a period of unlawful detention?

II.

Whether it was error for the trial Court to permit the witness Whitmire to give testimony where the Government had deliberately frustrated the efforts of the defendants to talk to this witness and had given the defendants an incorrect address for this witness on the capitol list?

III.

Whether it was error for the Court on its own Motion to fail to appoint an attorney to advise Whitmire of his rights?

IV.

Whether it was error to deny defendant Irby's Motion for Severance?

I N D E X

TABLE OF CASES

* Cases and authorities chiefly relied upon are marked with asterisks.

SUMMARY OF ARGUMENT

I. The lower Court permitted the witness Whitmire to testify over the appellant's objection. This objection was predicated upon the fact that the identity of Whitmire was learned by the police during a period of unlawful detention of defendant Brown. Thus the testimony of the witness Whitmire is inadmissible under the Mallory rule and the Supreme Court's decision in Wong Sun v United States, 371 U. S. 471 (1963).

The testimony and documentary evidence discloses that the Government knew or should have known, from the facts, the exact whereabouts of the witness through Detective O'Brien, but yet the capitol witness list at all times contained an erronerous address for him. There is a definite purpose inherent in the rule requiring the Government to afford a defendant a list of its witnesses. The purpose was deliberately frustrated in this case. This coupled with the fact that Whitmire was kept apart from other witnesses, secreted even while at Court shows the essence of prejudice. When added together with all the circumstances, including failure of the Court to furnish Whitmire with counsel to advise him of his rights, the results was a failure of due process and fair trial for defendant, Irby.

Prior to trial and through the final proceedings, Irby moved the Court for a severance from the other defendants. The defendants Brown and Jones had given affidavits exonerating Irby. These were of record. Irby was prejucially hampered by being unable to call either as his witness. This posture of the case required a severance at the trial. Brown's seizure and emotional breakdown in the presence of the trial was so prejudicial to the defendant Irby as to make severance mandatory. Failure to grant his motion for severance at this point, made a fair trial virtually impossible and a mockery.

JURISDICTIONAL STATEMENT

The defendant John D. Irby was indicted along with one Rhozier T. Brown and Robert L. Jones in the United States District Court for the District of Columbia in a 1 Count indictment charging violations of 22-2401 of D.C. Code. A jury found this defendant guilty as charged. The United States District Court for the District of Columbia entered judgment on the jury verdict, and this appeal is taken from that judgment. This Court has jurisdiction by virtue of 28 U. S. C. f 1291.

STATEMENT OF THE CASE

On October 9, 1964, the defendant Rhozier Brown was arrested and held for a period of about fourteen hours, from ten in the morning until eleven at night. The arrest was made within a stone's throw from Court and a committing magistrate. During this time he was not informed of his right not to incriminate himself (TR333); nor was he advised of his right to counsel (TR333). He was refused permission to make even one telephone call (TR329). He was beaten (TR329, TR339-341) and was not taken before the United States Commissioner. He was deprived of food until about seven o'clock that night at which time he was given a cup cake and a soda (TR328), while the defendant Brown was being so detained, he made a statement to the police in which he implicated the defendant John D. Irby and one Robert Jones, a fellow named Louie, and the witness Whitmire in the October 2, 1964 slaying of one Lonnie Page (TR330).

At the trial of the defendants Irby, Jones and Brown, the witness Whitmire was called as the Governments' key witness. He was permitted to testify over the objections of defense counsel in a manner incriminating both to himself and to the defendants in the case. Although this witness testified at length about his own participation in the alleged crime, he has never

been indicted or tried for his participation. The facts of the case clearly indicate that the witness Whitmire was discovered solely as a direct result of the statement made to the police by the defendant Brown.

In capitol cases the Government is supposed to furnish the defendant a list containing the complete names and addresses of all the persons the Government intends to call as witnesses. The witness Whitmire was one of the Government's key witnesses in this case. When the capital list was furnished to defense counsel, it contained the name of the witness Whitmire, however, the address given was an address where this witness had not lived for over a year (TR 361). However, the address given by the Government to the marshall was the correct address for this witness. It was an address in care of the one Detective O'Brien, of the Homicide Office. The defense counsel had numerous investigators trying to locate the address of the witness Whitmire. They were unable to find it. (TR361)

Prior to the trial defendants Brown and Jones gave affidavits wherein they stated that neither was in the company of Irby on October 2, 1964. At the commencement of the trial Brown had a seizure in the pre-

sence of the jury, became rigid, stared blankly, all the while spitting in his hands and frantically rubbing his hands upon his face. The trial was suspended and Brown was committed to St. Elizabeth's Hospital for several days.

II.

The defendant Irby made a Motion for a Severance on the ground that his joinder with Brown was prejudicial to his right to a fair trial. Brown made incriminating statements to the police prior to the trial, and during the course of the trial Brown in the full presence of the jury became very emotionally ill, and upset, became rigid, contorted and in a state of seizure. The Court stopped the trial and ordered that he be given a mental examination. The doctors found that Brown's conduct was due to the fact that he was, as they described "Scared to Death."

A R G U M E N T

I.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS WHITMIRE TO TESTIFY WHERE HIS EXISTENCE WAS OBTAINED THROUGH STATEMENTS TAKEN FROM DEFENDANT DURING AN ILLEGAL DETENTION

Under the Mallory rule evidence other than confessions which is obtained during an illegal detention is not admissible in evidence. See Bynum Case, 104 U. S. App. D. C. 368, 262 F 2d 465. The testimony of the witness Whitmire is the "fruit of the poisonous tree", and like the confession, itself, should be excluded from evidence. It would be useless to exclude a confession if in the course of such confession the defendant discloses the names of his accomplices and the police could then take this person and use him to convict the defendant. Especially is this true, where as here, when they would not have been able to obtain a conviction, had they not obtained the forced confession.

"The purpose of the Mallory rule is to avoid interrogation during periods of illegal detention, no matter what it may disclose of an incriminating nature, whether it be a statement, an identification of a witness, location of a weapon, or any other material item of evidence which could be used against the per-

son detained. The Mallory rule is designed to render useless any information which the police obtain during an unlawful detention."

Judge Wright said in Killough vs U. S.:

"I find nothing in Silverthorn (251 U. S. 385) or Nardone (308 U. S. 338) or any subsequent case, that distinguishes between more and less rotten "fruits" of police wrongdoing. I do not understand those cases as holding that tainted evidence which, by itself, if not completely standing, should be treated as untainted. Nor d es such a distinction survive realistic analysis. It sufficies to pose the case of the murder weapon which is uncovered as the result of an illegally obtained confession."

The Supreme Court applied the same doctrine in the case of Wong Sun v U. S., 371 U. S. 471 (1963). In that case the location of narcotics was determined as a result of interrogating the defendant. The statements obtained during the interrogation being the result of an unlawful arrest, were held to be inadmissible and as a result all leads and evidence obtained from those statements were likewise inadmissible.

The Court said:

"We now consider whether the exclusion of Toy's declaration requires also the exclusion of the narcotics taken from Yee, to which those declarations

led the police. The prosecutor candidly told the trial Court that 'we couldn't have found those drugs except that Mr. Lay helped me to'. Hence this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence "from an independant source", Silverthorn Lumber Co. v United States 251 U. S. 385, 392; nor is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. Nardone v U. S. 308 U. S. 338 we need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by expolitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'. Maguire, Evidence of Guild 221 (1959). We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy."

In the case at Bar since the detention was unlawful, it is submitted that the testimony of the

witness discovered as a result of the statement was inadmissible under Wong Sun.

"Knowledge gained by the Government's own wrong cannot be used by it. "Silverthorn Lumber Company vs U. S. It is respectfully submitted that upon the authorities cited above, the admission into evidence of the testimony of Whitmire must be deemed error requiring a reversal of this conviction.

II.

IT WAS ERROR FOR THE COURT TO ALLOW WHITMIRE TO TESTIFY WHERE HIS ADDRESS WAS KNOWN, YET INCORRECTLY GIVEN ON THE CAPITOL WITNESS LIST

It is well settled and the rules of this Court require that a list of the Government's witnesses be furnished a defendant in a capitol case.

The record shows that this is a capitol case. The government had a duty to furnish a correct list of its witnesses. This it did not do, not withstanding the fact that at all times it knew or should have known Whitmire's whereabouts. (TR361,529-540).

The fact of the incorrect witness list, coupled with the evidence that established that Whitmire was kept in seclusion, points to a deliberateness in this particular (TR499-501). To the extent that this value is reflected in the privilege, it is impaired by requiring confession to a crime even where there

will be no criminal liability therefor. See also in RE Bart, 113 U. S. App. D. C. 54, 57-58, 304 F2 631.

The entire circumstance of the apprehension, interrogation of the witness Whitmire was such as to require the Court to Act to afford him counsel prior to testifying (TR374-379). Whitmire was hauled into police headquarters, interrogated at length from about noon to 5:00 p.m. o'clock on October 22, 1964. The police thereafter kept in close contact with Whitmire by personal calls or telephone.

III.

THE COURT WAS IN ERROR IN FAILING TO APPOINT COUNSEL TO ADVISE WHITMIRE OF HIS RIGHTS, SUA SPORTE

In the case of Earl v U. S. Court of Appeals 19,316, defendant sought to call as a witness, co-defendant whose indictment had been dismissed without prejudice, the Court sua sporte questioned him and appointed counsel to advise him as to his privilege against self incrimination. Whitmire was called as a witness by the Government and allowed to testify over objections and without advice of counsel. He boldly admitted that he had participated in a brutal murder and robbery. Tehan w U. S. ex rel Shatt, 382 U. S. 406, 416 (1966), outlines the Supreme Courts' reflection in the privilege against self-incrimination and points out its respect for the inviolation of the

III. THE COURT WAS IN ERROR IN FAILING TO APPOINT COUNSEL TO ADVISE WHITMIRE OF HIS RIGHTS, SUA SPORTE

human personality. Fair play and due process in a capitol case such as this demands that the Government adhere to such rules as that imposed in connection with an accurate capitol list of witnesses. It is well established that the purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. Brady vs Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2 215 (1963), Application of Kapatas, 208 F. Supp. 883 (S. D. N. Y. 1962). Detective O'Brien (TR539-540) stated that all subpoenas for Whitmire were addressed in his care and directed to him.

IV.

WHETHER IT WAS ERROR TO DENY DEFENDANT IRBY'S MOTION FOR SEVERENCE?

RULE 14 OF FEDERAL RULES OF CRIMINAL PROCEDURE PRO_ VIDES:

"If it appears that a defendant is ***** prejudiced by a joinder ** *** for trial together, the Court may order **** separate trials **** or provide whatever other relief justice requires."

Prejudice has consistently been held to occur when **** (joinder) embarrasses or confounds an accused in making his defense. Cross v United States, U. S. 118 U S. App. D. C. 324 (1964).

Warning of the Supreme Court in Blumenthal v

United States, 332 U. S. 559, 68 S. Ct. 257, 92L. Ed 154, "evidence might be transferred to one to whom it does not apply, this must constantly be in mind in permitting and in reviewing joint trials-- a danger" likely to arise in an conspiracy trial and more likely to occur as the number of persons charged together increases."

Defendant Irby moved the Court for severance prior to trial. Affidavits, of record, from both defendants Brown and Jones had the effect of exonerating Irby of the criminal charges. Thus results of being joined for the trial thwarted the defense of Irby. He could not use or call the only witnesses who could reasonably clear him of these serious charges.

We recognize the restrictions imposed by Rule 14 of the Federal Rules of Criminal Procedure, but believe the Court's duty is a continuing one at all stages of the trial and must whereas here prejudice is apparent grant the motion for severance, Schaffer v United States, 362 U. S. 511, 516 (1960). Peckham v United States, 93, U. S. App. D. C. 136, 210 F 2d 693 (1953). Wynn v United States, 107 U. S. App. D. C. 190, 275 F2d 648.

All defendants were of necessity affected by the atomsphere created at this trial by the outbreak and

emotional upheaval of defendant Rhozier Brown. This was inescapable.

The testimony by doctors relative to Malingering and of being "scared to death" had the effect both inferentially and direct of saying this man is guilty, these defendants are guilty, by all circumstances we must urge that a severance was demanded.

CONCLUSION

Wherefore it is respectfully submitted that taken together the errors herein discussed were such as to taint the trial throughout to such a degree that the essence of due process was aborted. It is further submitted that fair play and due process , that a new trial be granted to John D. Irby and that judgment of the District Court should be reversed.

Dovey J. Roundtree

DOVEY J. ROUNDTREE
Attorney for John D. Irby

19192 allowed until today to file petition

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19890

ROZZIER T. BROWN, Jr., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19890

RHOZIER T. BROWN, Jr., Appellant

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION OF APPELLANT RHOZIER T. BROWN, Jr.,
FOR REHEARING EN BANC

Pursuant to Rule 26 of this Court, Appellant Rhozier T. Brown, Jr., respectfully petitions for a rehearing en banc of the decision of this Court entered on December 30, 1966, affirming appellant's conviction and sentence to life imprisonment for the crime of murder. As grounds for rehearing appellant submits the following:

1. The principal issue herein is whether a Government witness, Willie B. Whitmire, should have been allowed to testify against appellant when his identity was learned of as a result of a statement admittedly taken from appellant in clear violation of his rights under Rule 5a of the Federal Rules of Criminal Procedure, See Page 16 of decision of this Court.

This Court held that the testimony of the witness, Willie B. Whitmire, was admissible, notwithstanding that it was "fruit from a poison tree." Essentially, the majority ruled that

a lapse of 13 months from the date of appellant's statement, when Whitmire's identity was ascertained, to Whitmire's testimony at time of trial, attentuated any tainted connection which might originally have existed. The majority reasoned that the innumerable incidents that usually intervene in the life of any person during the 13 months interim period helped to attentuate the original tainted connection.

The majority opinion relied upon Smith and Bowden v. U. S., 117 U.S. App D.C. 1, 324 F 2d 879; Wong-Sun v. U.S., 371 U.S. 471, for the "attentuated taint" doctrine, but far exceeded the application given to the doctrine in the two cases.

2. The majority opinion represents an important issue concerning the proper judicial course for the District of Columbia Circuit in all cases such as the instant one. Therefore, it is for good reason that the decision should be reviewed en banc.

WHEREFORE, appellant respectfully submits that pursuant to Rule 26 of this Court, it would be appropriate for this case to be reheard en banc so that the important question presented by this petition can be considered and determined by all members of this Court.

M. Michael Cramer
Attorney for Appellant

H. Thomas Sisk
Attorney for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing en banc is presented in good faith and not for purposes of delay.

M. Michael Cramer
766 Executive Building
15th at L Street, N.W.
Washington, D. C. 20005
223-2555

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for rehearing en banc was mailed, postage prepaid, this _____day of January, 1967, to the Office of the United States Attorney, U.S. Court House, Constitution at John Marshal Place, N.W., Washington, D. C.

M. Michael Cramer